Supreme Court, U.S.
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No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE J. KELLY
Petitioner,

v.

BASS PRO OUTDOOR WORLD, LLC,
d/b/a BASS PRO SHOPS OUTDOOR WORLD,
Respondent.

On Petition For A Writ of Certiorari
To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under the Due Process Clause of the 14th Amendment to the United States Constitution, is a State Appellate Court required to independently determine the permissible punitive damages?

II. Should a state appellate court reverse a verdict for punitive damages based solely on the ratio of actual to punitive damages?

III. Can a unanimous jury verdict of $4,300.00 in actual damages and $2,800,000.00 in punitive damages comport with due process, if the facts show a high degree of reprehensibility?

IV. Should this Court revisit whether the 14th Amendment to the United States Constitution sets substantive rights of limited punitive damages?

PARTIES TO THE CASE

All parties are contained in the caption.

RULE 29.6 DISCLOSURE

Bass Pro Outdoor World, LLC is a limited liability corporation in Missouri, which listed William B. Scheer, III as its organizer.

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IN THE

SUPREME COURT OF THE UNITED STATES

KYLE J. KELLY

Petitioner,

v.

BASS PRO OUTDOOR WORLD, LLC,
d/b/a BASS PRO SHOPS OUTDOOR WORLD,

Respondent.

On Petition for A Writ of Certiorari
To The United States Supreme Court

The Petitioner, Kyle J. Kelly, respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the March 18, 2008 Order of the Missouri Supreme Court denying transfer, thereby affirming the December 18, 2007 Opinion of the Missouri Court of Appeals, Eastern District.

BASIS FOR JURISDICTION

The decision of the Missouri Supreme Court to be reviewed was filed March 18, 2008. This Petition is filed within 90 days of that date, Rule 13.1.

Petitioner invokes this Court's jurisdiction under 28 USC §1257(a).

INTRODUCTION

This is a whistleblower case, with a unanimous jury verdict of $4,300.00 in actual damages for lost wages and $2,800,000.00 in punitive damages. The trial judge affirmed the verdicts, after reviewing State Farm Automobile Insurance Company v. Campbell, 538 U.S. 408 (2003), submitted with Defendant's post trial three part motion. Defendant appealed, and the Missouri Court of Appeals, Eastern District, remanded for a new jury trial on the amount of punitive damages only, based upon a finding that the ratio between actual and punitive damages was unconstitutionally excessive, under the Due Process Clause of the 14th Amendment to the United States Constitution. Both parties filed Motions for Rehearing, requesting, in part, that the Missouri Appellate Court determine the constitutionally maximum permissible amount of punitive damages. The Appellate Court denied said motions. The Missouri Supreme Court refused transfer.

FACTS

The case arises from the termination of Plaintiff's employment for Defendant as a result of Plaintiff reporting the head of Loss Prevention for having broken into an automobile.

Plaintiff, born July 3, 1972, attended Missouri Law Enforcement Training Academy in 1997 and 1998, qualifying as a Class A certified police officer. He was a public safety officer at St. Louis University, hired by Defendant for its St. Charles, Missouri store in August, 2001.

Sometime prior to April 11, 2003 Deborah Bost's Buick "died". Bost coasted it into a designated parking space on property not owned, used or under the control of Defendant, but by another company, Greater Missouri Builders. Bost locked the car. The Buick had no damage, and the vehicle identification number was clearly visible. The vehicle was titled in her name. There was nothing to indicate that the Buick had been involved in any crime or had been abandoned. Bost never authorized anybody from Bass Pro to use a slim jim on her car.

Karl Ritter, Defendant's head of Loss Prevention for the St. Charles store, agreed that there was nothing unsafe about the Buick. Ritter testified that he had two separate notices from associates that there was an abandoned car on the parking lot, one a week prior and one on the morning of April 11, 2003. He never identified these people, nor did anyone so testify. There were no complaints from Bass Pro's management or the loss prevention department regarding the Buick, prior to April 11, 2003. Ritter made no effort to learn the name and address of the owner of the Buick by the license plate and/or the vehicle identification number. He admitted that he could have, by contacting the St. Charles Police or the Missouri Department of Revenue, or asking Bass Pro's lawyers to do so. Several witnesses testified that in 2003, you could write the Missouri Department of Revenue, enclose Two Dollars ($2.00) and get the name of the owner. Rodgers, the store manager, testified that he was not aware of any effort by anybody to find the Buick's owner, before Ritter broke into it with a slim jim. Ritter testified that there was no need to

break into the Buick to learn the owner's identity, and the owner's name was a minor issue, but that was the sole reason offered by the Defendant at trial for Ritter's breaking into the Buick with a slim jim.

Another St. Charles store Loss Prevention department employee, Michael McKernon, had called the St. Charles Police Department about the Buick, because that is what Ritter had asked him to do. The St. Charles Police Department told McKernon they were aware of the Buick, and the license plates were up to date. There was nothing they could do about it, because it was not illegally parked. Bass Pro could not tamper with it, because it was on private property. Ritter told McKernon that he had called the St. Charles Police, and they told him the same thing.

On Friday, April 11, 2003, Michael McKernon was operating a camera in the monitor room from 5:00 a.m. until 9:00 a.m. Ritter came into the monitor room with a kind of a "smirk" on his face. He said to McKernon, "Do you want to see something funny, watch this, I am going to break into that car." McKernon turned the video camera out to where the Buick was parked. McKernon saw Ritter come across the parking lot with what appeared to be his own slim jim, which he retrieved from his own truck. Slim jims had not been issued to Loss Prevention personnel or authorized by Defendant. The video tape, made by McKernon, depicts Ritter's breaking into the Bost vehicle, including repeatedly jamming the slim jim up and down on both the front and rear right doors of the Buick.

Southerly, the assistant manager of the store's Loss Prevention department, arrived at work around 9:00 a.m. and saw McKernon viewing the tape. Thereafter, McKernon and Southerly discussed the issue and formed opinions regarding Ritter's use of the slim jim. Plaintiff arrived around 12:00 p.m. After the three reviewed the video, they unanimously agreed that Ritter had no reason or probable cause to break into the Bost vehicle with a slim jim, and it was illegal. Another loss prevention agent, Todd Kirk arrived on Friday, and McKernon showed him the tape. Kirk estimated that 5 to 7 people saw it on Friday. Craig Lazarro and Donald Hake, Loss Prevention agents, viewed the tape that afternoon. Hake, who later became a federal police officer, testified that he witnessed a crime, which he identified as tampering with a vehicle, in violation of Missouri State Statutes Section 569.090. Almost all members of the Loss Prevention Department saw the tape. Everyone, who had come into the Loss Prevention office, was talking about it. The tape was shown constantly on Saturday, April 12, 2003. It was standard procedure for Loss Prevention agents to update one another on what had happened that day. Eric Hart said discussions were held between himself, Bobby Southerly, Mike McKernon and Todd Kirk about Ritter breaking into the vehicle. All were loss prevention agents.

On either Friday or Saturday, Plaintiff called the St. Charles Police Department from the monitor room and explained the events to the desk sergeant, as a hypothetical situation without using any names or identification whatsoever. After that conversation, Plaintiff decided that it absolutely had to be reported

to higher authorities at Defendant's store. Southerly testified, that after that call, Southerly, McKinnon and Plaintiff decided to talk to somebody in higher authority at Defendant's store. Plaintiff was elected to do that.

On Saturday afternoon, April 12, 2003 Plaintiff went to Lee Beasley, the assistant store manager, as Jerry Rodgers, the store manager, was not there that weekend. Plaintiff reported the break-in to Beasley. This was in Beasley's closed door office, with no one else present. Plaintiff asked Beasley, if he wanted to see the tape. Beasley said he might look at it later. When reporting the incident to Beasley, Plaintiff believed he was following the Bass Pro Code of Conduct. Plaintiff testified that Beasley asked who all knew about the break-in, and Plaintiff told him everybody in the Loss Prevention department. Beasley testified that he told Plaintiff not to talk to anybody about this, except Lee Rodgers and himself. Plaintiff testified that Beasley's testimony was false and that Beasley had said "make sure this doesn't leave the Loss Prevention department." This follows the Code of Conduct[1] and also the practice of the Loss Prevention

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[1]The Bass Pro Loss Prevention code of conduct, provides in pertinent part:

> "loss prevention representatives at all levels are privy to confidential information. Such privileged information includes, but is not limited to... Confidential information as it pertains to civil and criminal matters. It is pertinent that information of this nature be kept confidential and within the loss prevention department** Confidential information is not to be discussed with any associate outside the loss prevention department without prior

department. From the day he first saw the tape, until the day of the trial, Plaintiff did not discuss the break-in with anybody outside the Loss Prevention department, except with his attorney and in his deposition. Defendant does not claim that Plaintiff told anyone outside Loss Prevention about the Ritter break-in of the Buick.

Plaintiff worked on Sunday and Monday, and the tape was still a topic of conversation. It was still being shown constantly in the Loss Prevention office. On Sunday or Monday morning, Ritter told McKernon "whoever made that phone call to the police department, their employment with Bass Pro is going to be short."

Plaintiff was off Tuesday and Wednesday. On Thursday, April 17, 2003, shortly after Plaintiff returned to work, Ritter told Plaintiff that Rogers wanted to speak with him. Plaintiff went to Rodgers' office, where he met Rodgers and Ron Goetz, the human resources manager. Rodgers asked Plaintiff

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approval from the director of loss prevention.
"...At no time will Bass pro Shops ever take action against an associate for making known a problem, no matter how controversial it may be."
"In some rare occasions you may have a concern which cannot be handled through conventional channels that may deal with confidential, delicate matters, including difficulties with individuals in your chain of management. You may bring such inquiries directly to the attention of any member of management who is in a position to answer your questions or resolve the difficulty."

what had happened on Friday morning. Plaintiff explained the whole situation to Rodgers. Rodgers then had Goetz read from the handbook, regarding disobeying a supervisor's direct order. Plaintiff denied he disobeyed any direct order. Rodgers claimed that Plaintiff told others, after Beasley told him not to tell anybody. Rodgers never identified who Plaintiff allegedly told of the Ritter break-in. When there was a discussion regarding Plaintiff's call to the St. Charles Police Department, giving a hypothetical situation, Rodgers said "You don't work for the police, You work for Bass Pro." Plaintiff replied that his security license mandated that agents report crimes. Rodgers then terminated Plaintiff. Rodgers testified that he was going to fire Plaintiff, whether or not an actual crime had been committed by Ritter.

Shortly after Plaintiff was fired, Rodgers called a Loss Prevention meeting, in which he announced that he had given permission to Ritter to break into the vehicle. He testified in his deposition, that he was unaware the Buick was there, prior to Ritter's break-in. He indicated there was to be no further discussion of the incident, and anyone, who did, would be fired. Within a week or two after Plaintiff was fired, both Craig Lazarro and Don Hake no longer worked for Bass Pro, but they were not fired. Nothing happened to Ritter. Lee Beasley was made general manager of the Springfield, Missouri branch store, and Jerry Rodgers was made general manager of the Cincinnati, Ohio store.

Missouri approved jury instructions 10.01, 4.15 and 35.19 required the jury to find that "the conduct of

Defendant... was outrageous because of Defendant's evil motive or a reckless indifference to the rights of others" in order to award punitive damages. The jury was also directed to award "...such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct." (App. 1 & 3) The jury returned a unanimous verdict for $4,300.00 in actual damages (App. 4). After a bifurcated final argument on punitive damages and further deliberations, the jury returned a unanimous jury verdict for $2,800,000.00 in punitive damages (App. 5). The Trial Court entered a Judgment pursuant to the verdicts (App. 6). Defendant filed a three part post trial motion (App. 7) which was denied by the Trial Court (App. 8).

On Defendant's appeal, the Missouri Court of Appeals, Eastern District, determined that the facts establish that Plaintiff had a reasonable belief that Ritter committed a crime; that Plaintiff had not violated any direct order of management; that Plaintiff was fired for reporting what he believed to be a crime; that Defendant's management threatened other employees with loss of their jobs, if they did not conceal the crime; and that Defendant had numerous witnesses give false testimony to conceal the real reason for Plaintiff's termination. The Appellate Court determined Plaintiff made a submissible whistleblower cause of action and affirmed the verdict for actual and punitive damages. The Appellate Court remanded the case for a new jury trial on the issue of the amount of punitive damages only, holding the amount violated the Due Process Clause of the United States Constitution. (App. 9) The Appellate Court found Plaintiff was entitled to $4,300.00 in actual damages

and some punitive damages. It found that $2,800,000.00 in punitive damages, with only $4,3000.00 in actual damages, violated the Due Process Clause of the 14th Amendment to the U.S. Constitution. No State Farm v. Campbell analysis is contained in the Opinion. Instead, there is only a reference to the ratio of actual to punitive damages. The verdicts were unanimous (App. 4 & 5) and the Trial Court, by denying Defendant's post-trial motion, found the amount of the verdict did not violate the Due Process Clause of the 14th Amendment to the United States Constitution. (App. 8)

The Missouri Supreme Court denied transfer, (App. 15), thereby affirming the Opinion of the Missouri Court of Appeals, Eastern District. (App. 9)

REASONS TO GRANT THE PETITION

I

In BMW of North America, Inc. v. Gore, 515 U.S.559, 561 (1996), this Court declined to decide what a state appellate court should do, when it finds a punitive damages award is unconstitutionally excessive under the Due Process Clause. The issue was not ripe, as the Alabama Supreme Court had not decided whether the case should be remanded for a new trial on the amount of punitive damages or whether the verdict should be reduced to a specific sum. In this case, the Missouri Supreme Court has affirmed the Appellate Court's Opinion that a new trial on the amount of punitive damages is appropriate, without any determination of the maximum permissible punitive damages under the Due Process Clause. In fact, other than a reference to Campbell, the Opinion provides no specific guidance as to what the trial court should consider in assessing the amount of punitive damages. Petitioner respectfully requests this Court's intervention. If an appellate court does not make some determination of the maximum permissible punitive damages that can be awarded, then the parties are potentially subjected to the endless running of the movie "Ground Hog Day" without ever seeing the conclusion. This case could be on an endless cycle of jury verdicts and appellate reversals. This is certainly not in keeping with the notion of a meaningful hearing, intrinsic to the Due Process Clause, with notice and an opportunity to be heard. Mullane v Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314 (1950). Both parties will be denied the meaningful hearing guaranteed under the Due Process Clause of the 14th amendment. Mullane,

supra. Petitioner maintains that an Appellate Court has a duty to determine the maximum amount that can be awarded under the Due Process Clause. Once that determination is made, the Appellate Court should then allow the Plaintiffs to accept the reduced punitive damages award or have the case remanded for a new trial on the amount of punitive damages.

The parties now have no idea what a permissible punitive damages award would be under the facts. If this Court does not act, it is potentially going to result in numerous hearings without any meaning. This result is juxtaposed to a fundamental aspect of the Due Process Clause and judicial economy.

The writ should issue because it is the duty of the Missouri Supreme Court to determine a maximum amount of punitive damages, under the facts of this case. In State Farm Automobile Insurance Company v. Campbell, 538 U.S. 408, 429 (2003), this Court decided:

> "An application of the Gore guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million, therefore, was neither reasonable nor proportionate to the

> wrong committed, and it was an irrational and arbitrary deprivation of the property to the defendant. The proper calculation of punitive damages, under the principles we have discussed should be resolved in the first instance by the Utah Courts."

On remand, the Utah Supreme Court did not order a new trial but "exercise(d) our independent judgment to reach a reasonable and proportionate result." Campbell v. State Farm Mut. Auto. Ins. Co., 98P3d 409, 412 (Utah 2004). Similarly, the 9th Circuit in Leatherman Tool Group, Inc. v. Cooper Industries, Inc., 285 F.3d 1146, 1151 (9th Cir. 2002) did not order a new trial. It "determine(d) the constitutional maximum on the basis of the existing record."

Most federal appellate courts have made their own determination. In Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir.), cert denied, 528 U.S. 931 (1999), the 11th Circuit held that "The Court, not the jury has a responsibility for determining this constitutional limit" because Court's, not juries "decide questions of law." Johanson, supra at 1331. The 11th Circuit specifically determined "(A) Court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the Due Process Clause." Id. These decisions cannot be harmonized with the Missouri Appellate Opinion in this case. If an appellate court has a mandatory duty to correct an

unconstitutionally excessive verdict, it cannot remand the case for a new jury trial on the issue.

Some Courts have offered the Plaintiff either remittitur or a new trial. Continental Resources, Inc. v. Oxy USA, Inc., 101 F.3d 634 (10th Cir. 1996), cert denied, 520 U.S. 1241 (1997); BMW of North America, Inc. v. Gore, 701 So.2d 507 (Ala. 1997). First though, these Courts determined what maximum punitive damages award would be consistent with due process. Oxy, supra at 643; Gore, supra at 515. Plaintiff maintains that an appellate court should determine the maximum punitive damages allowable under the facts and provide that either the Plaintiff should accept that amount of punitive damages or there shall be a new trial on the amount of punitive damages only. This follows Missouri state law in reviewing excessive actual damages awards. Barnett v. LA Societe Anonyme Turbomeca France, 963 S.W.2d 639, 669 (Mo. banc 1998).

This Court should grant the Petition and remand the case for the Missouri Supreme Court to determine the maximum permissible punitive damages under the Due Process Clause, with Plaintiff having the option of accepting that remitted amount or a new trial on the amount of punitive damages.

II

The Missouri Court of Appeals, Eastern District's Opinion, adopted by the Missouri Supreme Court refusing transfer, relied entirely upon one portion of State Farm Mutual Automobile Insurance

Company v. Campbell, 538 U.S. 108 (2003), and accepted that as dogma. It ignored other pertinent parts of Campbell, in determining that the $2,800,000.00 punitive damages award violated the Due Process Clause of the 14th Amendment to the United States Constitution. The Missouri Court of Appeals, Eastern District's Opinion isolated Campbell's language that "few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process." (A-39) In doing so, the Missouri Court of Appeals, Eastern District ignored the teachings of this Honorable Court in State Farm, supra. This Court has consistently refused to identify concrete constitutional limits on the ratio between actual and punitive damages. BMW of North America, Inc. v. Gore, 517 U.S. 559, 582 (1996). It also clearly held that a particularly egregious act that has only resulted in a small amount of economic damages may result in a high ratio of punitive damages and comport with due process. BMW, supra at 582. As a result, each case must be examined on its own. The Missouri Opinion failed to perform any examination and just relied on the ratio.

In Pacific Mutual Life Insurance Company v. Heslip, 499 U.S.1 (1991) this Court said "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit in every case." The Opinion of the Missouri State Court shows that the judiciary needs further enlightenment and education on this issue.

The State Appellate Court's Opinion did not identify the state interest that the punitive damages award was designed to serve, (App. Pg. 38-41), which this Court has identified as an initial focus with a due process review of the excessiveness of a punitive damages award. BMW of North America, Inc. v. Gore, 515 U.S. 559, 574 (1996). In this case, the state interests include: punishing unlawful conduct and deterring its repetition, Gore, supra at 568; protecting personal property, particularly automobiles, State v. Ringer, 266 S.W.2d 626, 630 (Mo. 1954); the employment security of Missouri citizens, §288.020 RSMo (1951); and protecting employees who report criminal activities of their employers. Brenneke v. Department of Missouri Veterans of Foreign Wars of the United States of America, 984 S.W.2d 134 (Mo.App.1998).

This Court should review this case, so there is clear precedent that a State Appellate Court must identify the state interest and must analyze the degree of reprehensibility under the instructions of this Court in Campbell, before any action can be taken with regards to a determination of the excessiveness of a punitive damages award under the Due Process Clause. A verdict should not be reversed solely based on the ratio of actual to punitive damages. As stated by this Court in Campbell, the precise award in a case must be based upon the facts and circumstances of the Defendant's conduct or harm to the Plaintiff. Since Campbell, trial and appellate courts have demonstrated that a single digit ratio is not a

mandate.[2] This Court has previously approved a ratio of 526:1 as not being a violation of the Due Process Clause. TXO Prod. Corp. v. Alliance Resources Corp, 509 U.S. 443 (1998). The underlying State Opinion reverses the jury verdict simply based upon the ratio of 651:1 between the actual and punitive damages. Guidance from this Court is needed, that a court should not reverse a jury verdict simply based upon the ratio.

As held by this Court, an appellate court is to undertake a de novo review whether a punitive damages award is constitutionally excessive, accepting the factual findings of the trial court in conducting the excessive inquiry and the factual findings of the jury, unless they are clearly erroneous. Cooper Industries Inc. v. Leatherman Tool Group, Inc., 532 U.S.424, 435-439 (2001). In the case at bar, the Appellate Court did not perform any de novo review of the factors described by this Court. Instead, it simply commented on the ratio. (App 38-40) The State Opinion ignores the constitutional analysis pronounced by this Court. The Opinion essentially establishes that under the Due Process Clause, a new jury trial can be ordered by a state appellate court solely upon its determination that

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[2] Kemp v. American Telephone and Telegraph, 394 F.3d 1354 (11th Cir. 2004) approved a ratio of 2,172:1 in a case for improper billing; William v. Coffman County, 352 F.3d 994, 1015 (5th Cir. 2003) approved a 150:1 ratio; Lincoln v. Case, 340 F.3d 283 (5th Cir. 2003) approved a 100:1 ratio in a landlord/tenant discrimination action; Mathias v. Accord Economy Lodging, Inc., 347 F.3d 672 (7th. Cir. 2003) approved a ratio of 37:1 in a case against a hotel for re-renting rooms infested with bedbugs and Miller v. Levering Regional Healthcare Center, LLC, 202 S.W.3d 614 (Mo.App.Ed. 2006) approved a 24:1 in a wrongful death claim.

the ratio between actual and punitive damages is too high, regardless of the facts of the case, including low economic damages and a high degree of reprehensibility.

Based on the facts in this case, the entire jury and the trial court believed $2,800,000.00 was constitutionally correct to punish Defendant and to deter it and others from like conduct. This Court should accept transfer to so advise the Missouri Supreme Court to affirm that finding. The ratio alone was not a basis to reverse the unanimous jury verdict, which the trial judge determined comported with the Due Process Clause.

III

The Missouri Court Opinion in the case at bar fails to follow the instructions of this Court in Campbell. As this Court held in State Farm Insurance Company v. Campbell, 538 U.S.408, 419 (2003):

> "The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the Defendant's conduct," Gore, 517 U.S. at 575, 116 S.Ct. 1589. We instruct the Courts to determine the reprehensibility of a Defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evidenced an indifference or a reckless disregard of the health or safety of others; the target of the conduct had financial

> vulnerability; the conduct involved repeated actions or was an isolated incident; the harm was a result of intentional malice, trickery or deceit, or mere accident. Id at 576-577, 116 S.Ct. 1589. The existence of any one of these factors weigh in favor of Plaintiff may not be sufficient to sustain a punitive damages award; the absence of all of them renders any awards suspect. It should be presumed that Plaintiff had been made whole for his injuries by compensatory damages, punitive damages should only be awarded at the Defendant's culpability after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. Id at 575, 116 S.Ct. 1589.

The State Appellate Court did not follow the instructions of this Court. Instead, it simply commented on the ratio of economic to punitive damages. (App. Pg. 38-41) If the State Appellate Court had followed the instructions of this Court in Campbell, it would have found a high degree of reprehensibility of the Defendant's conduct and affirmed the $2,800,000.00 verdict of punitive damages.

Under the first element, the harm was economic, as opposed to physical, but under established precedent, low economic damages can justify a high

ratio of punitive damages. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1998). In TXO Prod., a ratio of 526:1 was approved in a slander of title cause of action. $10,000,000.00 in punitive damages was constitutionally permissible, with only $19,000.00 in actual damages. This Court analogized a man wildly firing a gun into a crowd causing damage to a $10 pair of glasses. This Court agreed with the state court that a jury reasonably could find only $10 compensatory damages but thousands of dollars in punitive damages "to teach a duty of care." Substantial punitive damages were proper to discourage future bad acts. The $2,800,000.00 punitive damages in the case at bar was to discourage the extremely reprehensible act of firing an employee for reporting what he reasonably believed was a crime, threatening other employees with termination, and intentionally concealing the real reason for the termination. The State Appellate Court's Opinion did not even mention the relevant TXO Prod, supra opinion.

Under the second element, the jury in the case at bar had to find that Defendant's outrageous conduct, showed a complete indifference to and conscious disregard for the rights and safety of others, to find Defendant liable for punitive damages. The State Appellate Opinion agrees with this finding. (App. Pg. 35-38) As a result, the Verdicts (App. 4–5) and State Appellate Opinion (App. Pg. 35-38) establish the second element. A numerical comparison between actual and punitive damages has no substantial basis for determining whether a message of punishment and deterrence is accomplished. This Court, with this case, should advise all courts not to consider a dramatic

disparity between actual damages and punitive damages or a high ratio to be controlling in cases of this character. TXO Prod., supra

Under the third element of the financial vulnerability of the Plaintiff, Defendant took away Plaintiff's livelihood. With low income wage earners such as Plaintiff, jobs are essential to their existence. The loss of a job puts them in a class of extreme financial vulnerability.

Under the fourth element, the State Appellate Opinion notes the repeated incidents in which Defendant could have corrected its misconduct. (App. Pg. 33-34) Instead, Defendant consciously acted in a course of deceit and trickery to conceal the wrongful conduct of one of its management. Defendant could have corrected the situation: by viewing the video tape; talking with the Loss Prevention Department employees who worked on Friday and Saturday; performing a cursory investigation and admitting what the tape showed. (App. Pg. 36-38) It could have taken some action at any point up to when Plaintiff was terminated or even up through the time of trial. Instead, Defendant intentionally chose to repeatedly cover up the actions of management, rather than admit the wrongdoing and correct the problem. In fact, Lee Beasley and Jerry Rodgers, upper management integrally involved in the cover-up, were promoted. This is a strong reprehensibility factor, weighing in favor of a high punitive damages award. TXO Prod., supra. Defendant was so bold in this case, that it threatened numerous employees with termination, if they did not conceal the crime committed by

management. (App. Pg. 29-30) The termination of Plaintiff was not an isolated incident, but rather, part of an entire scheme to cover up the criminal activity of management, as described in the State Appellate Court's Opinion. (App. Pg. 33-34)

Under the fifth element, the termination of Plaintiff clearly was the result of intentional malice, trickery and deceit, as opposed to a mere accident. The State Appellate Court's Opinion notes that Defendant engaged in numerous activities to cover up the criminal activity of management. This includes the following facts: Bass Pro management committed a crime that was reported by the Plaintiff; Plaintiff was terminated because he reported this criminal activity; Bass Pro management concocted a false reason for Plaintiff's termination and had its managers commit perjury to cover up the real reason for Plaintiff's termination; Defendant threatened other employees with termination, if they did not cover up the criminal activity of management; and Defendant repeatedly refused to correct the problem through trial. (App. Pg. 33-34 & 37) Defendant, in fact, promoted the management for covering up the real reason for Plaintiff's termination. Defendant's entire defense was a deceitful fraud on the Court, the jury and all its employees. It was a concocted story to scare employees to never report crimes. Bass Pro's message was loud and clear - if you report what you have a reasonable basis to believe is a crime committed by management, you will be fired. What amount will punish that and deter Defendant and others from having the same policy? In TXO Prod., supra, a scheme of trickery warranted a punitive damages award of

$10,000,000.00 with only $19,000.00 in actual damages.

Testimony justifying $2,800,000.00 in punitive damages included:

1. Beasley, the assistant store manager to whom Plaintiff reported the break-in of the automobile, testified he told Plaintiff not to discuss the Ritter incident with anyone, other than he and Rodgers, but he never gave those instructions to anyone else in loss prevention. His father is vice president of Defendant.

2. Beasley never looked at the videotape of Ritter breaking into the automobile before his deposition.

3. Beasley did not know all Loss Prevention employees saw and discussed the tape and what Ritter did.

4. It was the written policy of and practice in Loss Prevention to share the events that occurred.

5. Beasley did not understand Bass Pro's Loss Prevention Code of Conduct.

6. Ritter testified he did not kick the Buick car door shut. The video tape shows this is a lie. (App. Pg. 24-25)

7. Ritter, the head of loss prevention for his store, did not know what Bass Pro's Code of Conduct said.

8. Ritter thought the name of the Buick owner was a minor issue, but Bass Pro's whole defense was he broke in to the car to ascertain the name of the owner.

9. Ritter never studied his deposition or looked at the tape in preparation for the trial.

10. Ritter testified in his deposition he inquired of Sergeant Akers, of the St. Charles Police Department, whether a report had been filed or he had seen a report with Ritter's name on it involving Bass Pro. Sergeant Akers testified that never happened.

11. Ritter testified he never made any effort to find out who talked about the break-in, but he was head of loss prevention for his store.

12. Rogers, the Bass Pro store manager, did not view the videotape before his deposition on September 9, 2004.

13. Rogers told Ritter he could break into the Buick, but he also testified he never knew the Buick was there. The Missouri Court of Appeals Opinion emphasized this lie. (App. Pg. 34)

14. Rogers called a Loss Prevention meeting to lie about why Plaintiff was fired and to put fear in all Loss Prevention employees of reporting any head of a department. He told the other employees they would be fired, if they discussed the incident. (App. Pg. 34)

15. Neither Beasley nor Rogers knew everyone in Loss Prevention discussed this event, although it was the written policy and the practice of the Loss Prevention Department.

16. Defendant has permanent records that Plaintiff was fired because of insubordination.

Clearly, the repeated and wide spread nature of the mendacious testimony of the Defendant's witnesses shows a clear attempt to cover up its wrongful conduct. In State Farm, supra at 410, this Court held that where a "particularly egregious act has resulted in only a small amount of punitive damages", greater ratios would comport with due process. Remanding for another jury to determine the amount of punitive damages only is a denial of due process to the Plaintiff. Twelve jurors and the trial Court have determined $2,800,000.00 is the proper amount to punish Bass Pro and to deter it and others from like outrageous conduct, which showed complete indifference to or conscious disregard for the rights of others.

IV

With all due respect, Plaintiff urges this Honorable Court to review its decision in BMW of North America, Inc. v. Gore,, 517 U.S. 559 (1996). State Farm, supra The Due Process Clause of the 14th Amendment to the United States Constitution provides no substantive protections against excessive or unreasonable awards of punitive damages. The punitive damages jurisprudence, which has sprung forth from Gore, is insusceptible of principle

application. The United States Constitution does not constrain the amount of punitive damages awards.

Fundamentally, process is synonymous with proceeding. Webster defines "process" as the preferred term when progress from a definite beginning to a definite end is implied and something is thereby made or produced or is changed from one thing into another. A good definition of process is the procedure followed. That is entirely distinct from the substantive right of punitive damages. Punitive damages are to punish the Defendant and to deter it and others from like conduct. In each case, that is a factual determination of the jurors who saw and heard the witnesses and weighed the evidence in deliberation. The 14th Amendment does not give the Court a right to take away the fundamental American right to a jury trial and the verdicts they enter.

The legal fiction that the Due Process Clause of the 14th Amendment to the United States Constitution imposes substantive limits on the discretion of state courts to affirm unanimous jury verdicts for punitive damages actually constitutes a license to permit large corporations to financially enslave its employees. Judicial imposition of a mathematical ratio between actual and punitive damages is an intrusion on and erosion of one of the most fundamental American rights of trial by jury.

The Campbell Opinion is confusing at the least and self-contradictory at the most. As Justice Scalia's dissenting opinion in Campbell, supra at 429 states, ratios of punitive to actual damages are "unsusceptible

to practical application". This case illustrates this point vividly. In the case at bar, the Missouri Court of Appeals, Eastern District is locked into the single digit ratio concept and nothing else. (App. Pg. 38-40)

CONCLUSION

This Court should issue its Writ of Certiorari .

GERRITZEN & GERRITZEN

By: _____

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APPENDIX

1. Jury Instruction Number 10 ..... A-1

2. Jury Instruction Number 11 ..... A-2

3. Jury Instruction Number 12 ..... A-3

4. Verdict A A-4

5. Verdict B A-6

6. Judgment of Honorable Nancy L. Schneider, St. Charles County Circuit Court, dated May 4, 2006 ..... A-7

7. Defendant's Post-Trial Motion to: (1) Set Aside the Verdict on Compensatory Damages and the Judgment Thereon and Enter Judgment for Defendant; or, in the Alternative, (2) Grant New Trial Because the Verdict on Compensatory Damages Was Against the Weight of the Evidence; or, in the Alternative, (3) Grant New Trial Because the Verdict on Compensatory Damages was the Result of Prejudicial Error During Trial filed on June 2, 2006 ..... A-9

8. Judgment of Honorable Nancy L. Schneider, St. Charles County Circuit Court, denying Defendant's Post-Trial Motion, dated July 7, 2006 ..... A-18

9. Opinion of the Missouri Court of Appeals, Eastern District, dated December 18, 2007 ..... A-19

10. Plaintiff/Respondent's Motion for Rehearing, or, in the Alternative, to Transfer to the Missouri Supreme Court dated December 28, 2007 ..... A-42

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13. Plaintiff's Application for Transfer to the Supreme Court, dated February 11, 2008 ..... A-67

14. Defendant's Application for Transfer to the Supreme Court, dated February 13, 2008 ..... A-81

15. Order of the Supreme Court of Missouri, dated March 18, 2008 ..... A-99

CERTIFICATION

As required by Supreme Court Rule 33.1 (h), I certify that the document contains 6170 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1 (d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 2008.

RAY A. GERRITZEN

INSTRUCTION NO. 10

If you find the issues in favor of Plaintiff, and if you believe the conduct of Defendant as submitted in Instruction Number 7 was outrageous because of Defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find Plaintiff entitled under Instruction Number 9, you may award Plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish Defendant and to deter Defendant and others from like conduct.

Plaintiff MAI No. 10.01 (1990 Revision)

INSTRUCTION NO. 11

Instruction 11 through 12 and general Instruction 1 through 5 apply to the determination of punitive damages to the assessed against Defendant, Bass Pro Outdoor World, LLC, d/b/a Bass Pro Shops Outdoor World, use Verdict B to return your verdict as to the amount of punitive damages.

Plaintiff MAI No. 2.05 (1980 New) and 35.19

INSTRUCTION NO. 12

In addition to any compensatory damages you assessed in Verdict A, you may assess an additional amount as punitive damages in such sum as you believe will serve to punish Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, for the conduct for which you found that Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, is liable for punitive damages and will serve to deter Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, and others from like conduct.

Plaintiff MAI No. 4.15 (1980 New) and 35.19 combined

VERDICT A

Note: Complete this form as required by your verdict.

On the claim of Plaintiff, Kyle J. Kelly for compensatory damages for lost wages against Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, we the undersigned jurors, find in favor of:

Plaintiff, Kyle J. Kelly

Plaintiff, Kyle J. Kelly	or	Bass Pro Outdoor World, d/b/a Bass Pro Shops Outdoor World

Note: Complete the following paragraph only if one or more of the above findings is in favor of Plaintiff, Kyle J. Kelly.

We, the undersigned jurors, assess the compensatory damages of Plaintiff, Kyle J. Kelly at $4,300.00.

Note: If you found in favor of Plaintiff, Kyle J. Kelly, and against Defendant, Bass Pro Outdoor World, LLC. d/b/a Bass Pro Shops Outdoor World, complete the following paragraph by writing the word(s) required by your verdict.

We, the undersigned jurors, find that Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, (is or is not) is liable for

punitive damages.

s/George Hook	s/Jennifer Cartwright
s/Steven Swanton	s/Brenda Cox
s/Daniel Rees	s/William Warner
s/Marlene Green-Chrum	s/Carl Scibetta
s/Michael Craven	s/Rose Lindhorst
s/Barbara Stewart	s/Sandra Mueller

VERDICT B

We, the undersigned jurors, assess punitive damages against Defendant, Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, at $2,800,000.00.

s/George Hook	s/Jennifer Cartwright
s/Steven Swanton	s/Brenda Cox
s/Daniel Rees	s/William Warner
s/Marlene Green-Chrum	s/Carl Scibetta
s/Michael Craven	s/Rose Lindhorst
s/Barbara Stewart	s/Sandra Mueller

IN THE CIRCUIT COURT OF ST. CHARLES
COUNTY, MISSOURI
CIRCUIT JUDGE DIVISION TWO

Kyle Kelly
Plaintiff,

Vs. Cause Number 03cv127432

Bass Pro Outdoor World L.L.C.
Defendant.

JUDGMENT

Cause comes duly on trial on 04-25-06 through 04-28-06. Parties appear with counsel and announce ready. Come also sixty venireman, found qualified, and therefrom twelve jurors, George Hook, Rose Lindhorst, Marlene Green-Chrum, Sandra Mueller, Daniel Rees, Barbara Stewart, William Warner, Jennifer Cartwright, Brenda Cox, Carl Scibetta, Steven Swanton and Michael Craven are duly selected, sworn and instructed. Following opening statements, Plaintiff adduces evidence and rests. Defendants written Motion for Directed Verdict filed, and ordered denied. Defendants adduce evidence and rest. Rebuttal evidence adduced. Evidence declared closed. Defendants written Motion for Directed verdict filed, and ordered denied. Jury instructed, cause argued and the jury withdraws to deliberate. Thereafter, the jury returns to open court and reports its verdict as follows: Verdict "A" On the claim of Plaintiff, Kyle J Kelly for compensatory damages for lost wages against Defendant, Bass Pro

Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World, we the undersigned jurors, find in favor of Kyle J Kelly. We the undersigned jurors assess the compensatory damages of Plaintiff Kyle J Kelly at $4300.00. We the undersigned jurors, find that Defendant, Bass Pro Outdoor World LLC d/b/a/ Bass Pro Shops Outdoor World "IS" liable for punitive damages./s/ all jurors Verdict received accepted and entered on Verdict A. In Phase Two; Jury instructed, cause argued and the jury withdraws to deliberate. Thereafter, the jury returns to open court and reports its verdict as follows: On Verdict "B" We, the undersigned jurors, assess punitive damages against Defendant Bass Pro Outdoor World, LLC d/b/a Bass Pro Shops Outdoor World at $2,800,000.00/s/ all jurors. Verdict read, jury polled and verdict ordered filed.

Dated: 5/4/06

SO ORDERED:

s/Nancy L. Schneider
Nancy L. Schneider
CIRCUIT JUDGE DIVISION TWO

FILED
May 04 2006
Circuit Clerk
St. Charles County

IN THE CIRCUIT COURT
FOR THE 11TH JUDICIAL CIRCUIT
ST. CHARLES COUNTY

FILED
Jun 02 2006
Circuit Clerk
St. Charles County
Case No. 03CV127432

KYLE J. KELLY,

Plaintiff,

v.

BASS PRO OUTDOOR WORLD, L.L.C.,

Defendant.

Division No. 2

DEFENDANT'S POST-TRIAL MOTION TO:

(1) SET ASIDE THE VERDICT ON COMPENSATORY DAMAGES AND THE JUDGMENT THEREON AND ENTER JUDGMENT FOR DEFENDANT; OR, IN THE ALTERNATIVE,

(2) GRANT NEW TRIAL BECAUSE THE VERDICT ON COMPENSATORY DAMAGES WAS AGAINST THE WEIGHT OF THE EVIDENCE; OR, IN THE ALTERNATIVE,

(3) GRANT NEW TRIAL BECAUSE THE VERDICT ON COMPENSATORY DAMAGES WAS THE RESULT OF PREJUDICIAL ERROR DURING TRIAL

COMES NOW Defendant Bass Pro Outdoor

World, L.L.C. ("Bass Pro"), by and through its counsel of record, and hereby moves the Court to set aside the verdict on compensatory damages and the judgment entered thereon, pursuant to Rule 72.01 (b), and enter judgment for Defendant, or, in the alternative, grant a new trial pursuant to Rule 78.01 because the verdict on compensatory damages was against the weight of the evidence; or, in the alternative, grant a new trial pursuant to Rule 78.01 because the verdict on compensatory damages was the result of prejudicial error during trial. Suggestions in Support of Defendant's post-trial motion on compensatory damages are filed herewith and incorporated herein.

Defendant states the following grounds for its post-trial motion on compensatory damages:

1. The Court erred in failing to grant Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence and Defendant's Motion for Directed Verdict at the close of all evidence because:

    a. there was no evidence that Plaintiff reported an actual crime;

    b. the Court erred in allowing Plaintiff to submit his whistleblower claim to the jury upon a showing that he reasonably believed his supervisor Karl Ritter committed

a crime;

c. the evidence was insufficient for a reasonable jury to find that Plaintiff's belief that Ritter committed a crime was reasonable;

d. Plaintiff was required to prove Ritter committed an actual crime because Plaintiff pled that Ritter committed a crime in his Petition, which was never amended;

e. the evidence was insufficient for a reasonable jury to find that Defendant discharged Plaintiff because of his report of Ritter's conduct; and

f. the evidence was insufficient for a reasonable jury to find that Plaintiff's report of Ritter's conduct was the sole and exclusive cause of his discharge from employment.

2. The Court committed instructional errors which were highly prejudicial to Defendant, including:

a. the Court erred in giving the verdict director because the verdict director allowed the jury to find for Plaintiff whether or

not Karl Ritter committed a crime; and

b. the Court erred in giving the verdict director because it used the word "crime" rather than identifying the specific statute allegedly applicable to Ritter's conduct, Section 569.090 RSMo.

c. the Court erred in refusing Defendant's Instructions B, C, D and E.

3. The Court erred in admitting evidence that was cumulative, highly prejudicial to Defendant, and not relevant to any issues in the case, including:

a. Testimony and documentary evidence that Bass Pro had no ownership of or control over the parking lot;

b. Testimony to the effect that the location of the vehicle was "not a threat to Bass Pro's business";

c. Testimony that the vehicle did not interfere with Bass Pro's customers;

d. Testimony that the vehicle was not derelict or abandoned;

e. Testimony that Ritter could have obtained the name of the owner of the vehicle by contacting the St. Charles Police Department;

f. Testimony that Ritter could have obtained the name of the owner of the vehicle by contacting the Department of Revenue or the Department of Motor Vehicles;

g. Testimony that Ritter did not ask loss prevention officers to call the Department of Revenue or the Department of Motor Vehicles to get the name and address of the vehicle's owner;

h. Testimony suggesting that loss prevention officers quit their jobs in protest over Plaintiff being fired;

I. Testimony that Ritter lacked "probable cause" to enter the vehicle;

j. Testimony that Ritter's conduct constituted the crime of "breaking and entering into a vehicle";

k. Testimony that other loss prevention officers believed Ritter committed a crime.

4. The Court erred in allowing lay witnesses to speculate, to offer opinion testimony and to speak as expert witnesses without adequate foundation and without adequate designation, which caused substantial prejudice to Defendant. Such testimony included:

   a. Testimony speculating that the vehicle was damaged by Karl Ritter;

   b. Testimony that Ritter's conduct was a crime;

   c. Testimony that other loss prevention officers told Plaintiff that Ritter's conduct constituted a crime;

   d. Testimony by Plaintiff and other loss prevention officers that they believed Ritter's conduct was a crime;

   e. Testimony that Ritter did not have "probable cause" to enter the vehicle;

   f. Testimony that Ritter's conduct constituted the crime of "breaking and entering into an automobile."

5. The Court erred in allowing testimony

that "Bass Pro" owns 38 stores and in allowing Plaintiff to rely upon such testimony as evidence of Defendant's financial condition during the punitive damage phase of the trial, causing substantial prejudice to Defendant.

6. The Court erred in refusing to allow Defendant to introduce expert testimony in rebuttal to issues raised by Plaintiff during Plaintiff's case-in-chief, and such error caused substantial prejudice to Defendant.

7. The Court erred in limiting Defendant's use of Section 569.090 RSMo, during argument and while examining witnesses, causing substantial prejudice to Defendant.

8. The accumulation of errors during trial caused substantial prejudice to Defendant.

For the foregoing reasons, Defendant respectfully requests the Court grant its post-trial motion to set aside the verdict on compensatory damages and the judgment entered thereon, pursuant to Rule 72.01 (b), and enter judgment for Defendant, or, in the alternative, grant a new trial pursuant to Rule 78.01 because the verdict on compensatory damages was against the weight of the evidence; or, in the alternative, grant a new trial pursuant to Rule 78.01 because the verdict on

compensatory damages was the result of prejudicial error during trial.

Respectfully submitted,

ELLIS, ELLIS, HAMMONS & JOHNSON, P.C.

By s/Laura J. Johnson
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Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the attorneys of record for each party to this action, to-wit:

Ray A. Gerritzen
One U.S. Bank Plaza, Suite 2505
505 North 7th Street
St. Louis, MO 63101-1600

by U.S. Mail on this 2nd day of June, 2006.

s/Robert Thomeczek

Kyle Kelly

IN THE
CIRCUIT COURT
COUNTY OF ST. CHARLES, MO.

CAUSE NO. 03CV127432

Bass Pro Outdoor World LLC DATE: 7/7/06

Judgment

Defendant's post-trial motions heard and taken under advisement this date, are now ordered denied in their entirety.

On Plaintiff's motion to set interest rate, the Court orders and adjudges the applicable interest rate to be nine percent (9%) per annum pursuant to §408.040.1 RSMo.

SO ORDERED:

s/Nancy L. Schneider 7/7/06
Div 2

cc Counsel by fax

Opinion
Missouri Court of Appeals Eastern District

Case Style: Kyle J. Kelly, Respondent, v. Bass Pro Outdoor World, LLC, Appellant.

Case Number: ED88392

Handdown Date: 12/18/2007

Appeal From: Circuit Court of St. Charles County, Hon. Nancy L. Schneider

Counsel for Appellant: Mark G. Arnold, Ransom A. Ellis III and Laura J. Johnson

Counsel for Respondent: Ray Gerritzen

Opinion Summary:

Bass Pro Outdoor World L.L.C. appeals from the trial court's judgment entered after a jury returned a verdict in favor of Kyle J. Kelly on his claim for wrongful termination. The jury awarded Kelly $4,300 in actual damages and $2.8 million in punitive damages.

Bass Pro raises three points on appeal. First, it alleges Kelly failed to make a submissible case for punitive damages. Second, Bass Pro challenges the punitive damages award on constitutional grounds, claiming the $2.8 million verdict violated due process. Finally, Bass Pro argues Kelly failed to

make a submissible case for wrongful termination because Kelly did not have an objectively reasonable basis for believing his supervisor committed a crime.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Division Two holds: Kelly made a submissible case for wrongful termination and punitive damages. His award of $2.8 million in punitive damages, however, was unconstitutionally excessive.

Citation:

Opinion Author: George W. Draper III, Judge

Opinion Vote: AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Dowd, Jr. and Cohen, JJ., concur

Opinion:

Bass Pro Outdoor World, L.L.C., (hereinafter, "Bass Pro") appeals from the trial court's judgment entered after a jury returned a verdict in favor of Kyle J. Kelly (hereinafter, "Kelly") on his claim for wrongful termination. The jury awarded Kelly actual damages in the amount of $4,300.00 and punitive damages in the amount of $2.8 million. We affirm in part, reverse and remand in part.(FN1)

The facts, taken in the light most favorable to the

verdict, are as follows: Bass Pro operates a sporting goods and outdoor equipment retail store in St. Charles, Missouri. Bass Pro leases the property from Greater Missouri Builders, who also owns the parking lot surrounding the Bass Pro retail store. Bass Pro is permitted to section off portions of the parking lot surrounding the store for special events or to display certain products. Bass Pro monitors the parking lot via security cameras which relay images to a closed circuit television inside Bass Pro's store.

In August 2001, Bass Pro hired Kelly as a loss prevention agent. Loss prevention agents monitor the closed circuit televisions, conduct investigations, and participate in the apprehension of alleged shoplifters. Prior to working at Bass Pro, Kelly graduated from the police academy, was certified as a law enforcement officer, and had taken six to nine hours of criminal justice courses. Karl Ritter (hereinafter, "Ritter") was hired in late 2002 as the store's loss prevention manager. Prior to accepting this position, Ritter was a certified law enforcement officer with previous experience working as a police officer for the City of St. Peters, the Village of Hillsdale, and the City of Pagedale. Ritter also worked in the field of loss prevention for companies such as Service Merchandise, Airborne Express, and Best Buy. Bass Pro's loss prevention agents and officers were aware of Ritter's extensive background when Ritter came on board as the department's manager. Jerry Rogers (hereinafter, "Rogers") was hired as the store's general manager in February 2003. Lee Beasley (hereinafter, "Beasley") was the store's assistant general manager at the time.

The events which precipitated Kelly's termination and the filing of this lawsuit concern a Buick Park Avenue left on the parking lot outside of Bass Pro's retail store. Deborah Bost (hereinafter, "Bost") testified she purchased the Buick at some point in the fall of 2002. Approximately two to four weeks prior to April 11, 2003, Bost testified she encountered transmission problems while driving near Bass Pro's retail store. Initially, Bost turned into a private parking lot, but coasted the Buick toward the lot in front of the store, which she believed to be public parking. Bost maneuvered the Buick into a legal parking space. The Buick was not "movable" when she left it on the parking lot, but it was locked, in good condition, with no sign of visible damage. The license plates on the Buick were hers, but were registered to another vehicle Bost owned. Bost testified she did not contact anyone at Bass Pro to inform them she left the Buick on the parking lot nor did she give any Bass Pro employee permission to enter or tow her vehicle. Bost acknowledged she was unable to transfer the plates over prior to leaving the Buick on the parking lot.

Two store associates reported the Buick sitting on the parking lot to Ritter. Ritter examined the Buick and determined it was abandoned because the windshield was covered in pollen. Ritter directed several loss prevention officers to contact the St. Charles Police Department to have the Buick towed, but the police department declined because the vehicle was parked on private property. Later, Ritter contacted the St. Charles Police Department

personally to request that the Buick be towed. The dispatcher informed him that unless the vehicle was inoperable or the registration was not current, then it did not violate any ordinance and they could not authorize it to be towed. In an effort to determine ownership, Ritter contacted Sgt. Michael Akers (hereinafter, "Sgt. Akers") with the St. Charles Police Department. When Ritter asked Sgt. Akers to run the license plates to determine ownership, Sgt. Akers refused, stating it was against department policy to divulge that information. Further, Sgt. Akers informed Ritter the police department could not tow the vehicle because it was located on private property.

In the early morning hours of Friday, April 11, 2003, Michael McKernon (hereinafter, "McKernon"), a loss prevention agent, was working in the monitoring room at the Bass Pro retail store. Ritter entered the monitoring room around nine o'clock with a "smirked" look about him and told McKernon, "[Y]ou want to see something funny? Watch this[.] I am going to break into that car." Ritter told McKernon he was going to find out who owned the Buick. McKernon positioned the security camera to face the area where the Buick was parked and recorded the entire sequence of events. This video was shown to the jury.

McKernon testified he watched Ritter cross the parking lot with a "slim jim" in his hand.(FN2) Slim jims are not issued by Bass Pro to loss prevention personnel. Ritter testified he personally owned a slim jim for over twenty years and used the one he kept in

his car to gain access to the Buick. The video tape reveals Ritter initially had difficulty gaining access to the Buick and he spent approximately five minutes angling the slim jim in the front passenger side window. Ritter also attempted to pry the same window open by wedging the slim jim in between the window and windshield. After failing to gain access through the front passenger door, Ritter used the slim jim on the rear passenger door and gained entry. Once inside, Ritter searched through the backseat, the glove compartment, sun visor, and the trunk, but removed nothing from the Buick. Ritter testified the car had power locks, which he used to lock the car when he was finished. The video tape shows Ritter kicking the passenger side door shut with his foot after finishing his search. Ritter denied causing any damage to the Buick and conceded it was in good condition when he entered it.

McKernon showed the videotape to Bobby Southerly (hereinafter, "Southerly"), a loss prevention team leader, because he believed Ritter committed the crime of "breaking and entering or tampering" with the Buick. Southerly, who examined the Buick twice prior to April 11th, believed the Buick was parked legally. Southerly testified he was unaware of Ritter's intent or purpose for entering the Buick prior to viewing the videotape. After watching the video, Southerly concluded Ritter committed either "breaking and entering or tampering" and opined Ritter might have damaged the Buick by using an unauthorized slim jim to "break" into the car.

Kelly arrived for his shift at noon. McKernon and

Southerly expressed their concerns that Ritter committed a crime by entering the Buick and asked Kelly to view the videotape. Kelly was told Ritter stated he wanted to ascertain the identity of the owner upon entering the Buick. After viewing the videotape, Kelly stated he believed Ritter "lacked probable cause" to enter the Buick because no crime had been committed and it was parked legally. Kelly also believed Ritter used the slim jim improperly and may have damaged the Buick.

Kelly called the St. Charles Police Department from the monitoring room while McKernon and Southerly were present. Kelly spoke with a desk sergeant and relayed a hypothetical situation, omitting the identities of Bass Pro and Ritter, to determine the legality of Ritter's actions. Kelly informed the desk sergeant the person who entered the vehicle by using a slim jim was attempting to ascertain ownership.

The video was shown repeatedly over the course of the weekend. Several loss prevention agents and officers testified they viewed and/or discussed the video's contents with other members of loss prevention. However, no one discussed the incident outside of the loss prevention department, and at no point did anyone from management tell the members to refrain from discussing the incident.

After repeatedly viewing the videotape, discussing Ritter's actions with several loss prevention agents who had prior law enforcement experience, and anonymously contacting the St. Charles Police Department, Kelly decided to report the incident to

management based upon his belief a crime had occurred. Per store policy, Kelly should have reported the incident to his immediate supervisor, which was Ritter, but since Ritter was the subject of the accusation, Kelly was permitted to report the incident to a member of management. Rogers was off that weekend, so Kelly met privately with the assistant manager, Beasley, on Saturday, April 12th.

Kelly testified he described the situation to Beasley and told him there was a videotape of the incident. Kelly offered to show him the tape, but Beasley declined, stating "he might look at it later." Beasley testified he had no prior knowledge of Ritter's actions until Kelly brought them to his attention. Beasley asked who knew about the incident and Kelly answered, "the loss prevention department knows." Kelly indicated he wanted to call Bass Pro's corporate loss prevention manager, but Beasley asked him to wait until he spoke to Rogers and the store's human resources manager, Ron Goetz (hereinafter, "Goetz"). Kelly testified Beasley instructed him "do not let [this] leave the loss prevention department." Beasley testified he directed Kelly "not to talk to anyone about it except [Rogers] and myself" and said he was unaware every loss prevention agent and officer had viewed the video.

After Kelly met with Beasley, Kelly returned to the loss prevention department and told McKernon about their conversation. The video and Kelly's meeting with Beasley were "the topic of conversation" for days in the loss prevention department. Kelly worked his regular shift on

Sunday and Monday without further interaction with management about the incident.

On Monday, April 14th, Beasley met with Rogers to discuss what Kelly reported to him. Beasley indicated to Rogers the incident would "stay between us" meaning Beasley, Rogers, and Kelly. Beasley informed Rogers that Kelly contacted the police to discuss the matter. Rogers waited to take any action until he spoke to Ritter.

Rogers met with Ritter when Ritter returned to work on Tuesday, April 15th. Rogers told Ritter that Kelly reported the incident to Beasley and asked Ritter for an explanation. Ritter told him he was notified about the abandoned Buick, attempted to have the police department determine ownership or have it towed, and after those efforts failed, he used his personal slim jim to open up the car to ascertain ownership. Rogers testified he found Ritter's explanation reasonable, considered the incident a "non-issue," and did not reprimand Ritter for entering the Buick. Rogers testified he was unaware the Buick was on the parking lot prior to this incident, he did not review the videotape, and did not interview any other loss prevention personnel after speaking to Ritter.

Tuesday evening Ritter was contacted by a loss prevention officer who told him about Kelly's meeting with Beasley. This officer relayed Kelly's threat to contact Bass Pro's corporate loss prevention manager in an effort to get Ritter discharged or he would turn the videotape over to the authorities. Upon arriving at work on Wednesday, April 16th,

Ritter confronted McKernon about the call made to the St. Charles Police Department. Ritter threatened that when he found out who made the call, "their employment with Bass Pro was going to be cut short." Ritter met with Rogers later that day and told him about Kelly discussing his meeting with Beasley with other loss prevention agents. Ritter did not make any recommendation as to what action should be taken.

Based upon his meeting with Ritter, Rogers contacted Goetz. They concluded Kelly was insubordinate because he failed to follow Beasley's directive to not discuss the incident any further with anyone and as a result, Kelly would be terminated. Bass Pro's protocol for terminating employees requires the unanimous agreement of the employee's immediate supervisor and two members of management. If the employee's immediate supervisor is involved in the incident, he or she cannot be involved in the decision to terminate. Following this protocol, Rogers called John Sargent (hereinafter, "Sargent"), Bass Pro's regional human resources manager, to discuss the issue. Rogers told Sargent that Beasley directed Kelly not to discuss the incident with anyone, but Kelly discussed it with other associates. Rogers and Goetz recommended Kelly should be terminated for insubordination because he violated a direct order of his supervisor. Sargent agreed, despite conducting no independent investigation of the incident and without viewing the videotape.

Kelly returned to work on Thursday, April 17th and

met with Rogers and Goetz. Rogers asked Kelly if he knew why he was there and he said, "I think so." Rogers asked Kelly for his version of the incident, which Kelly provided, including his call to the police and his belief that Ritter's actions were illegal. Rogers asked Kelly if he was familiar with a rule in Bass Pro's "Loss Prevention Code of Conduct" about disobeying an order from a supervisor. At this point, Kelly was told he was terminated for disobeying Beasley's direct order that he refrain from discussing the incident further with anyone. Kelly denied getting a direct order and told Rogers he was instructed to keep the discussion within the loss prevention department. At the conclusion of the meeting, Kelly was terminated.

Within a week after Kelly was fired, Rogers called a loss prevention department meeting. Rogers told the department members he gave Ritter permission to "break into" the Buick. Rogers also explained Kelly was terminated for going outside of the chain of command by contacting the police about Ritter's actions and for failing to follow proper protocol with respect to his meeting with Beasley. Rogers stated Kelly was not fired for reporting the incident, but for revealing the content of the discussion he had with Beasley to other loss prevention department members after being explicitly told to refrain from doing so. Rogers also indicated the topic could no longer be discussed, and anyone who did so would lose their jobs as well.

On June 12, 2003, Kelly filed a single count petition alleging Bass Pro terminated him because he was a

"whistle blower" for reporting Ritter's crime of breaking and entering a motor vehicle while employed by Bass Pro. Kelly alleged he was discharged for reporting this incident, which was a violation of the public policy exception to Missouri's employment-at-will doctrine. Kelly sought actual damages in the form of lost wages and benefits, along with punitive damages.

Trial commenced on April 25, 2006. Bass Pro filed a motion for directed verdict at the close of Kelly's case, alleging Kelly failed to make a submissible case regarding retaliatory discharge. Specifically, Bass Pro alleged Kelly failed to identify a law or clear mandate of public policy that he believed Ritter violated. The trial court denied Bass Pro's motion. Bass Pro later moved for directed verdict at the close of all of the evidence, alleging again Kelly submitted insufficient evidence to support his claim of retaliatory discharge. The trial court denied this motion and submitted the case to the jury. The jury found in Kelly's favor, assessing an award of $4300.00 in actual damages and holding Bass Pro liable for $2.8 million in punitive damages. Bass Pro now appeals.

We begin with Bass Pro's third point, which challenges the submissibility of Kelly's claim for wrongful termination. Specifically, Bass Pro argues Kelly failed to prove he had an objectively reasonable basis to believe Ritter committed a crime when he entered Bost's vehicle.

Upon review of the trial court's denial of a motion for

directed verdict or JNOV, we must determine whether the plaintiff made a submissible case. Brown v. Bailey, 210 S.W.3d 397, 404 (Mo. App. E.D. 2006). "To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case." Kelly v. State Farm Mut. Auto. Ins. Co., 218 S.W.3d 517, 520-21 (Mo. App. W.D. 2007)(*quoting* Blue v. Harrah's N. Kansas City, L.L.C., 170 S.W.3d 466, 472 (Mo. App. W.D. 2005)). We take the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence. Hodges v. City of St. Louis, 217 S.W.3d 278, 280 (Mo. banc 2007). "A jury verdict will not be overturned unless there is a complete absence of probative facts to support the verdict." Martha's Hands, LLC v. Starrs, 208 S.W.3d 309, 314 (Mo. App. E.D. 2006).

The employment-at-will doctrine provides that an employer can discharge an at-will employee at any time for cause or without cause. Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 870-71 (Mo. App. W.D. 1985). One public policy exception to the at-will employment doctrine "provides that an at-will employee who has been discharged by an employer in violation of a clear mandate of public policy has a cause of action against the employer for wrongful discharge." Williams v. Thomas, 961 S.W.2d 869, 873 (Mo. App. S.D. 1998)(*quoting* Boyle, 700 S.W.2d at 871).

In Dunn v. Enterprise Rent-A-Car, 170 S.W.3d 1 (Mo. App. E.D. 2005), this Court held it was unnecessary for an employee to "allege or prove conclusively the law has been violated in order to state a cause of action" when the employee held a reasonable belief illegal conduct or conduct against a clear mandate of public policy has occurred. Dunn, 170 S.W.3d at 9. The Dunn court, relying upon the Illinois case of Johnson v. World Color Press, Inc., 498 N.E.2d 575 (Ill. App. 5th Dist. 1986) noted "an employee who has a reasonable belief that illegal activity is taking place should be able to report such belief to his or her supervisors without fear of termination." Dunn, 170 S.W.3d at 8; Johnson, 498 N.E.2d at 578. Moreover, public policy encourages an "employee to report *suspected* wrongdoing by coworkers" which he or she reasonably believes to have occurred. Dunn, 170 S.W.3d at 10. (Emphasis in original).

In the instant case, we believe Kelly made a submissible case for wrongful termination based upon his reasonable belief that Ritter committed a crime by entering Bost's vehicle without her consent. Kelly spoke to McKernon, who heard Ritter say he was going to "break into that car" and he viewed the videotape repeatedly. Kelly observed Ritter using a slim jim, a tool not provided by Bass Pro and not authorized for use, to obtain entry to the Buick, which was parked legally on private property. Further, Kelly discussed the issue with several loss prevention members to determine whether Ritter's actions were illegal prior to reporting them to

management. Each person Kelly spoke to indicated they thought Ritter committed the crime of either tampering or breaking and entering. Kelly even went so far as to contact the St. Charles Police Department anonymously and presented a hypothetical situation with all of the pertinent facts. Based upon that phone call, his conversations with other loss prevention members, and observing the tape, Kelly decided to report the incident to management because he believed a crime had occurred.

Moreover, there was ample evidence presented that linked Kelly's termination with the reporting of the incident. *See* Dunn, 170 S.W.3d at 9. First, taking the facts in the light most favorable to the verdict, the jury clearly believed Kelly when he testified Beasley told him to keep their discussion within the loss prevention department as instructed in the loss prevention code of conduct. The loss prevention code of conduct was admitted at trial.(FN3) Kelly testified he adhered to these guidelines by discussing the incident exclusively with other loss prevention members, thus following Beasley's instruction.

Moreover, Rogers testified he was going to terminate Kelly regardless of whether Ritter committed an actual crime. Rogers, Beasley, and Sargent all testified they failed to investigate the incident. No one in Bass Pro's management interviewed McKernon who heard Ritter say he was going to "break into that car." Further, no one viewed the videotape to ascertain the facts prior to determining what, if any, disciplinary action to take against Kelly, despite having access to the tape for several

days prior to Kelly's termination. Even after Rogers discovered McKernon taped the incident, he did not watch the videotape until his deposition was taken.

Most compelling is that Rogers held a meeting shortly after terminating Kelly. At that meeting, Rogers told the loss prevention team he gave Ritter permission to "break into" the Buick despite having no knowledge of the Buick or the incident until two days after it occurred. Rogers threatened that anyone who continued to discuss the issue would be terminated as well. Later, Rogers learned several loss prevention employees continued to discuss the matter after the meeting, but none of them were fired.

Bass Pro makes much of the fact that no crime actually occurred, and Kelly could not point to a specific law he believed that was violated. In Dunn, this Court held that in order for an employee to present a submissible case for reporting the alleged wrongdoing of a coworker, the employee "was required to identify a law or clear mandate of public policy that [the employee] believed [the supervisor] violated or would violate...." Dunn, 170 S.W.3d at 11. The employee is not required to prove an actual violation of law; however, he or she must cite some legal authority for the belief that the employer or coworker's conduct was unlawful or contrary to a clear mandate of public policy. Id.

Kelly and several other loss prevention members who had law enforcement experience testified they believed Ritter committed the crime of tampering in the second degree. Section 569.090.1(1) RSMo (2000)

states "a person commits the crime of tampering in the second degree if he or she...tampers with property of another for the purpose of causing substantial inconvenience to that person or to another." Bass Pro argues there was no evidence presented that Ritter's actions caused "substantial inconvenience" to Bost when he entered her vehicle to ostensibly determine ownership. Kelly was not required to prove each element of the crime he reasonably believed Ritter committed beyond a reasonable doubt. Rather, Dunn directs a plaintiff to cite legal authority, which Kelly presented at trial, and that it was not necessary to prove an actual violation occurred.(FN4)

Based upon the foregoing, we find sufficient evidence to support submission of this issue to the jury for wrongful termination based upon Kelly's reasonable belief that a crime had been committed when Ritter entered Bost's car, and his compliance with his supervisor's directive to not discuss the matter outside of the loss prevention department. Bass Pro's third point is denied.

Since Kelly made a submissible case for wrongful termination, we now turn to Bass Pro's points relating to the punitive damages award of $2.8 million. In its first point, Bass Pro argues the trial court erred in submitting and subsequently entering an award in Kelly's favor for punitive damages, in that Kelly failed to make a submissible case because there was insufficient evidence of malice presented to support the award.

When reviewing whether a plaintiff has made a submissible case for punitive damages, we look at the evidence in the light most favorable to submission, while disregarding all evidence and inferences which are adverse thereto. Hoyt v. GE Capital Mortg. Services, Inc., 193 S.W.3d 315, 322 (Mo. App. E.D. 2006). "A submissible case is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity--that is, that it was highly probable--that the defendant's conduct was outrageous because of evil motive or reckless indifference." Brady v. Curators of University of Missouri, 213 S.W.3d 101, 109 (Mo. App. E.D. 2006). To determine whether Bass Pro exhibited malice sufficient to support an award of punitive damages, we must examine whether Bass Pro committed a wrongful act intentionally and without just cause or excuse. Hoyt, 193 S.W.3d at 322.

Based upon our review of the facts in the light most favorable to submission, we find Kelly presented sufficient evidence to submit the issue of punitive damages to the jury. Initially, we note the incident that precipitated Kelly's termination was a wrongful act intentionally done by a member of Bass Pro's management. Based upon his previous conversations with officers at the St. Charles Police Department, Ritter knew the Buick was parked on private property, not owned by Bass Pro, and could not be towed legally by law enforcement. Instead of requesting someone from upper management contact Greater Missouri Builders, the owner of the parking lot, to see if it could have the Buick towed, Ritter

took action on his own. Ritter knew the parking lot was monitored via closed circuit television, yet prior to going out onto the parking lot with the alleged intent to determine ownership of the vehicle, he bragged to McKernon, "[Y]ou want to see something funny?" and directed him to "Watch this[.] I am going to break into that car." Thereafter, Ritter entered private property and proceeded to gain access to the vehicle by using his personal slim jim, an entry tool neither provided by or authorized for use by Bass Pro. Finally, upon learning that his behavior had been relayed to management, Ritter threatened that when he found out who reported him, "their employment with Bass Pro was going to be cut short."

Additionally, Bass Pro's response to Ritter's conduct, as shown by management's failure to interview anyone other than Ritter or investigate the incident by taking the minimal step of viewing the videotape prior to Kelly's termination, was without just cause or excuse, thus evidencing Bass Pro's reckless indifference to the possible crime a senior member of its management committed. With respect to viewing the tape, Kelly offered to show Beasley the tape, but Beasley declined, stating "he might look at it later." Rogers did not view the videotape until after Kelly filed this lawsuit. Most telling is Rogers' testimony that he was going to terminate Kelly regardless of whether Ritter committed an actual crime and that he told the loss prevention members after Kelly's termination that he authorized Ritter to "break into" the Buick, despite having no knowledge of the Buick or Ritter's actions until several days after it occurred.

All of this evidence, taken together, was sufficient proof of malice to submit the issue of punitive damages to the jury based upon Bass Pro's outrageous conduct. Bass Pro's first point is denied.

In its second point, Bass Pro Bass Pro challenges the punitive damages award on constitutional grounds, claiming the $2.8 million verdict violated due process. We agree, finding Bass Pro's constitutional challenge to the punitive damage award requires reversal and remand.

As a general matter, the assessment of punitive damages is a function left primarily for the jury. Miller v. Levering Regional Health Care Center, 202 S.W.2d 614, 618 (Mo. App. E.D. 2006). To prevail on its claim that Kelly's punitive damages award is unconstitutionally excessive, Bass Pro bears the burden of proof. Id. Our court reviews the constitutionality of an award of punitive damages by examining three factors: "(1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm and punitive damages award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases." Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140, 145 (Mo. banc 2005)(Teitelman, J., concurring); State Farm. Mut. Ins. v. Campbell, 538 U.S. 408, 418, 123 S.Ct. 1513 (2003).

We focus our analysis on the second Campbell guidepost, "the disparity between the harm and punitive damages award" because we find it compels

reversal of Kelly's punitive damages award. In Campbell, the United States Supreme Court stated generally, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 424. Moreover, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Id. We are mindful of the Scott court's admonition that appellate courts do not have "license to toss aside considered jury verdicts based upon arbitrary ratios or mathematical formulae [because to] do so would undermine the essential deterrent effect provided by properly awarded punitive damages." Scott, 176 S.W.2d at 144 (Teitelman, J., concurring). However, the Campbell court reasoned, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution, than awards with ratios in [the] range of 500 to 1." Campbell, 538 U.S. at 424. Further, we "must ensure the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." Id. at 426.

In this case, Kelly was awarded $4,300.00 in compensatory damages to cover his lost wages and benefits from the time he was terminated until he found alternative employment and $2.8 million in punitive damages. This resulted in a ratio of 651 to 1. This ratio raises a presumption of unconstitutionality per the holding in Campbell. Upon examining whether the punitive damages award was reasonable and proportionate to the harm

Kelly suffered by being terminated and unemployed for a relatively brief time, we must find the award is excessive and disproportionate. Thus, we are constrained by the United States Supreme Court's holding in Campbell and find Kelly's punitive damages award was unconstitutionally excessive and must be remanded for reconsideration.(FN5) Bass Pro's second point is granted.

Based on the foregoing, we affirm the trial court's judgment with respect to Kelly's claims for wrongful termination, the actual damages award, and punitive damages. We reverse and remand the cause for further proceedings consistent with this opinion.

Footnotes:

FN1. Kelly's motion to strike Bass Pro's brief for alleged Rule 84.04(c) violations, which was taken with the case, is denied.

FN2. A "slim jim" is a tool used to unlock a vehicle's door.

FN3. The code of conduct recognizes loss prevention personnel "are privy to confidential information" that must be "kept confidential and *within* the Loss Prevention Department" and not "discussed with any associate *outside*" the department. (Emphasis added).

FN4. Even *assuming arguendo* that Kelly needed to prove each and every element, a reasonable inference drawn from the video demonstrates Ritter damaged the Buick with his prolonged use of the slim jim and his kicking the door shut after it would not close when he used his hand. This evidence could support the "substantial inconvenience" element of tampering in the second degree.

FN5. Once there has been a jury finding as to the proper amount of punitive damages, the trial court can determine

whether the amount of the award is in accordance with Campbell, *supra*, and enter judgment accordingly.

Separate Opinion:
None

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
STATE OF MISSOURI

FILED
Dec 28 2007
Laura Roy
Clerk, Missouri Court of Appeals, Eastern District

KYLE J. KELLY, Plaintiff/Respondent,	)
v.	) Appellate No. ED88392
BASS PRO OUTDOOR WORLD, LLC, d/b/a BASS PRO SHOPS OUTDOOR WORLD,	) Appeal from the Circuit Court of St. Charles County) Cause No. 03CV127432) Honorable Nancy L. Schneider
Defendant/Appellant.	)

PLAINTIFF/RESPONDENT'S MOTION FOR REHEARING, OR, IN THE ALTERNATIVE, TO TRANSFER TO THE MISSOURI SUPREME COURT

NOW COMES Plaintiff/Respondent and hereby moves this Honorable Court to grant him a Rehearing of the Court's Opinion of December 18, 2007 under Missouri Supreme Court Rule 84.17, or, in the Alternative, Transfer this case to the Missouri Supreme Court under Missouri Supreme Court Rule 83.02, for the following reasons:

1. In the first 15½ pages of the 17½ page Opinion, the Court gives a scholarly presentation of the facts, which supported Plaintiff's claim for actual and punitive damages. In the last two pages of the Opinion, the Court holds that it was constrained

under Campbell to reverse the 2.8 million dollar punitive damages verdict and remand the case for a new trial, based upon the punitive to actual damages ratio of 651:1. This Motion shall be organized into: Overlooked and Misinterpreted Law; Overlooked Facts; and Reasons for Transfer.

OVERLOOKED AND MISINTERPRETED LAW

2. The Opinion contradicts US Supreme Court precedent that there is no fixed ratio between actual damages and punitive damages. The U.S. Supreme Court specifically held in State Farm Automobile Insurance Company vs. Campbell, 538 U.S. 408, 424-425 (2003), quoting BMW v Gore, 517 U.S. 559, 582 (1996):

> "We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even when it compares actual and potential damages to the punitive award. We decline again to impose a bright-line ratio, which a punitive damages award cannot exceed.

As the court stated in Campbell, the precise award in a case must be based upon the facts and circumstances of defendant's conduct and the harm to the plaintiff. Since Campbell, trial and appellate courts have demonstrated the single digit ratio is not a mandate: Kemp v American Telephone & Telegraph, 393 F.3d 1354 (11th Cir. 2004) affirmed a ratio of 2,172:1 in a case for improper billing; William vs. Kaufman County, 352 F.3d 994, 1015 (5th Cir. 2003) affirmed a 150:1 ratio; Lincoln vs. Case,

340 F.3d 283 (5th Cir. 2003) approved a 100:1 ratio in a landlord tenant discrimination action; Mathias v Accor Economy Lodging, Inc, 347 F.3d 672 (7th Cir. 2003) affirmed a ratio of 37:1 in a case against a hotel for re-renting rooms infested with bedbugs; and Miller v Levering Regional Health Care Center, LLC, 202 SW3d 614 (Mo App ED 2006) approving a 24:1 ratio in a wrongful death claim. In fact, the Supreme Court of the United States has previously approved a ratio of 526:1 as not being a violation of the Due Process Clause. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). This case involves a ratio of 651:1, but the ratio alone does not invalidate the Verdict. The Opinion is in direct conflict with Judge Romines brilliantly written opinion in Miller, supra at 619, which held, "There is no mathematical formula or bright-line ratio used to determine if a punitive damages award is excessive. ***** Rather, we consider three factors: 1) the degree of reprehensibility; 2) the disparity between the harm suffered and the punitive damages award; and 3) the difference between the award and the civil penalties authorized or imposed in similar cases.

3. The Opinion violates the review mandated under Cooper Industries, Inc v Leatherman Tool Group, Inc., 532 US 424 (2001). An appellate court undertakes a de novo review to determine whether a punitive damages award is constitutionally excessive, but the factual findings made by the trial court in conducting the excessiveness inquiry must be accepted unless clearly erroneous, Cooper Industries, Inc, supra at

435, along with the factual findings of the jury. Cooper Industries, supra at 439, footnote 12. This was particularly true with issues turning on witness credibility and demeanor, which have been held to be an integral part of reviewing the reprehensibility factor of a punitive damages award. Cooper Industries, supra at 440. The Opinion gives absolutely no deference to the jury's verdict of 2.8 million dollars or the Trial Court's affirmation of that verdict. The Trial Court made a factual finding that the actions of the Defendant were particularly reprehensible, as evidenced by its denial of Defendant's post-trial motions. The jury was required to find under Instruction No. 10 to award punitive damages, that the firing of Plaintiff was outrageous because of the evil motive or reckless indifference of Defendant to the rights of others (LF 54). Under Campbell, supra at 419, a finding of reckless indifference to the rights and safety of others is a factor in assessing the degree of reprehensibility. This was a finding of fact of the jury. The failure of the Opinion to give deference to the factual findings of the judge and the jury overlooks the analysis pronounced by the U.S. Supreme Court in Cooper Industries, supra.

4. The Opinion also fails to follow the analysis suggested by the U.S. Supreme Court in reviewing the excessiveness of a punitive damages verdict. As noted by the United States Supreme Court, reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages verdict. BMW v Gore, 517 US 559, 574 (1996) The Missouri courts have indicated that

the constitutional inquiry begins by looking at the reprehensibility of the defendant's conduct. Barnett v La Societe Anonyme Turbomeca France, 963 SW2d 639, 662 (Mo App WD 1998) In contrast, the Opinion focuses and bases its remand solely on the ratio of actual to punitive damages. It ignores the constitutional analysis pronounced by the U.S. Supreme Court. The numerous facts and cases justifying a high degree of reprehensibility are discussed below.

5. The Opinion ignores the precedent that "the federal excessiveness inquiry appropriately begins with an identification of the State interests that a punitive damage award is designed to serve." Gore, supra at 568. The Opinion does not identify any of the State interests in this case. In Gore, supra at 568, it was noted that a State had a legitimate interest in punishing unlawful conduct and deterring its repetition. This case has numerous additional State interests. Missouri has a strong public policy regarding protecting automobiles, as caselaw has long noted the importance that the legislature has placed on automobiles, as a special class of personal property, necessary in today's economy, such that they deserve the law's special consideration and protection. State v Ringer, 266 SW2d 626, 630 (Mo 1954) Missouri has even a stronger interest in protecting the employment security of its citizens as evidenced by the unemployment laws and tribunals and the fact that State government is largely run based on the taxation of wages earned in Missouri. In this case, not only was Plaintiff terminated, but numerous members of the loss prevention

department were threatened with termination. In re Exxon Valdez, 296 F.Supp. 1071, 1097 (D. Alaska 2004), the Court recognized that the livelihood of its citizens was a strong State interest. Finally, there is a strong State interest in seeing that employees who report criminal activity of their employers are protected. This is one of the principal State interests that underlie the recognition of a whistleblower claim. Therefore, this case involves strong State interests, and substantial damages are warranted to protect those interests. This is completely ignored in the Opinion.

6. The Opinion is a gross departure from established precedent as to remanding an excessive actual damage award. Missouri courts have clearly held that to be entitled to a new trial on the excessiveness of the verdict, a showing of trial court error has to be made. "The complaining party must show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury." Barnett v La Societe Anonyme Turbomeca France, 963 SW2d 639, 657 (Mo banc 1998) citing Callahan v Cardinal Glennon Hosp., 863 SW2d 852, 872 (Mo banc 1993) In fact, this Court has held that some event at trial must be shown to show a punitive damages award is unconstitutionally excessive. In Miller v Levering Regional Healthcare Center, LLC, 202 SW3d 614, 618 (Mo App ED 2006), this Court held:

> "Levering also claims the $240,000 aggravating circumstances award is

unconstitutionally excessive. To prevail, Levering must show 1) the verdict is excessive, and 2) some event occurred at trial that incited the bias and prejudice of the jury."

The Opinion overlooks this Opinion, and it only requires a defendant to show that the punitive damages to actual damages ratio is above 10:1.

7. If the jury's verdict is not the result of trial error or misconduct, but it appears to be grossly excessive, outrageous or the result of an honest mistake, "it is the duty of the court to modify the verdict". Barnett, supra at 661. In this case, no trial court error has been demonstrated, and there is no misconduct of Plaintiff was even mentioned. As a result, the appellate court's duty is either to affirm the award of punitive damages or modify the verdict such that it does not violate due process. Remand for a new trial should not be an option, unless Plaintiff refuses to accept the remitted verdict. Barnett, supra.

8. The Opinion essentially establishes a new precedent in Missouri that a new jury trial must be ordered when the ratio between actual and punitive damages is deemed too high by an Appellate Court. In Barnett, supra at 669, the court only ordered a new trial, if the Plaintiff did not accept the remitted verdict. A similar result was reached in Letz v Turbomeca Engine Corp., 975 SW2d 155, 180 (Mo App WD 1998) In Campbell, supra, the U.S. Supreme Court remanded the case to the Utah Supreme Court for a decision consistent with the Opinion. In BMW of North America v Gore, 517 US

559, 561 (1996), the U.S. Supreme Court noted that whether the appropriate remedy was a new trial or merely an independent determination by the Supreme Court was a matter for the Alabama Supreme Court to address. The Opinion remands the case for an entirely new trial on the amount of punitive damages. Since the underlying conduct will have to be brought out in this new trial, the Opinion mandates a retrial of the entire case. This is unprecedented under Missouri Law, in light of the Opinion's finding that Plaintiff established all the essential elements of the cause of action for actual and punitive damages, and there is no trial court error. It also does not follow the precedent of the U.S. Supreme Court that there is a de novo review for the excessiveness of the punitive damages award based on a violation of the due process clause. If the punitive damages award is being reversed solely based on the excessiveness of the punitive damages award violating the due process clause, and the appellate court is to review this de novo, then the appellate court should limit the punitive damages award only to the extent necessary to bring the award within constitutional limits and only order a new trial, if Plaintiff will not accept the remitted amount. Barnett, supra; and Letz, supra..

9. The Opinion overlooks the law and facts which establish the factors which necessitate a higher punitive damages award, including the high degree of reprehensibility of Defendant's conduct:

(A) Higher damage ratios are appropriate in cases with a small amount of economic damages, Campbell, supra at

1516; Gore, supra at 582. The Opinion notes that the actual damages are limited to $4,300.00, as the Plaintiff mitigated his damages and obtained another job, but it failed to note the US Supreme Court precedent that higher damage ratios are appropriate in these cases. In TXO Production Corp. V Alliance Resource Corp., 509 US 443 (1991), the U.S. Supreme Court approved a ratio of 526:1 in a case with only $19,000 in actual damages and $10,000,000.00 in punitive damages.

(B) Every opportunity the defendant had to correct the problem and failed to do so enhances the reprehensibility of the conduct. In re Exon Valdez, 296 F. Supp 2d 1071 (D. Alaska 2004). The Opinion itself notes that the numerous opportunities where the Defendant failed to act, but it fails to recognize that this establishes a greater degree of reprehensibility. The degree of reprehensibility in the case at bar far exceeds that in Miller v Levering Regional Health Care Center, 202 SW3d 614 (Mo App ED 2006) where a 24:1 ratio was approved with $10,000.00 in actual damages and $240,000.00 in aggravated circumstances damages. As shown by the facts found in the Opinion itself, which established as a matter of law and fact that a member of Bass Pro

management committed a crime that was reported by the Plaintiff; Plaintiff was terminated because he reported this criminal activity; Bass Pro management concocted a false reason for Plaintiff's termination and had its managers commit perjury to cover up the real reason for Plaintiff's termination; Bass Pro threatened other employees with termination, if they did not help cover up the criminal activity of management; and Bass Pro repeatedly refused to correct the problem through trial. Bass Pro's entire defense was a deceitful fraud on the court, the jury, and all its employees, including Plaintiff. It was a concocted story to scare employees to never report crimes of Bass Pro management. This conduct could have been corrected by viewing the videotape, talking with loss prevention employees, performing a cursory examination, admitting what the tape showed, and at any point up to when Plaintiff was terminated or at trial. Defendant intentionally chose to repeatedly cover up the illegal actions of management rather than admit the wrongdoing and correct the problem. This enhances the reprehensibility of its actions. TXO Prod., supra.

(C) The Defendant's actions constituted intentional misconduct directed at

someone who was financially vulnerable. The Court held in Gore, supra at 576:

"To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct ... or when the target is financially vulnerable, can warrant a substantial penalty."

As noted above, the jury found and the evidence established that the defendant fired Plaintiff for blowing the whistle on criminal activity of management and then management fabricated evidence to cover up why it fired Plaintiff. This clearly establishes intentional affirmative acts of misconduct. It also was directed at someone who was financially vulnerable. Plaintiff trained to be a security guard and Defendant took away his livelihood, as he lost his security license with his termination. With the hourly wages of Plaintiff and his educational background, taking his job takes away his means of providing for himself and his family. This is the essence of one who is financially vulnerable. This was overlooked completely in the Opinion, and the factors present in this case warrant a substantial penalty.

(D) The repeated activities of the Defendant in covering up the criminal activity warrant a substantial penalty also. In

Gore, supra at 576-577, the court noted that more severe damages are warranted with repeat offenses. In this case, there was not only a cover-up of why Plaintiff was fired, but other employees were threatened with termination, if they did not help conceal the criminal activity of management.

(E) Defendant persisted in covering up the wrongful termination of Plaintiff, after it clearly should have known of the criminal activity and engaged in deliberate false statements and concealment of evidence of improper motive. Pacific Mutual Life Ins. Co. v Haslip, 499 US 1, 5 (1991); TXO Production Corp., supra at 453. This is another factor warranting substantial punitive damages and was a noted issue in the above two opinions. In TXO, supra, ten million dollars in punitive damages was constitutionally permissible with only $19,000.00 in actual damages, primarily because of the reprehensibility of the defendant's actions involving a concocted scheme of fraud, trickery, and deceit. Defendant has engaged in the same scheme in this case, and under TXO, supra, a ratio of 526:1 would be constitutionally permissible or $2,261,800.00 in punitive damages.

(F) The punitive damages verdict in this case was not based on the defendant's

lawful conduct in other States, which was the case in Gore, supra; and Campbell, Supra

(G) The verdict was the result of a prudent jury, properly instructed by an experienced trial judge, which reached a calm and reasonable verdict on egregious facts, Miller, supra. at 620. At Defendants request, the actual and punitive damages deliberations were bifurcated (Tr 770). On the first phase of the trial the jury left the courtroom at 12:28 p.m. (Tr 808), and returned at 3:15 p.m. with its verdict for actual damages plus its findings for punitive damages (Tr 813-814). After accepting the verdict for $4,300 and that Bass Pro is liable for punitive damages, the trial court gave the jury Instructions 11 and 12 (Tr 814-816). After the 3 hour and 8 minute deliberation in which the jury determined there should be punitive damages, the jury deliberated another 58 minutes to unanimously reach the $2.8 million punitive damages (Tr 821-822).

These seven factors substantiate that Defendant's conduct showed a high degree of reprehensibility, which is the most important factor in determining the excessiveness of a punitive damages verdict. Campbell, supra. The Opinion overlooks these factors and the established precedents underlying the factors.

10. The Opinion is also in conflict with Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo.banc 2005), which noted Campbell held at 416, the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct and the harm to the Plaintiff and at 419 said that there are no ratio benchmarks where a particularly egregious act has resulted in only a small amount of economic damages. The Award must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff. Loss of Plaintiff's security license (Tr 404), his career goal of loss prevention and being permanently branded as insubordinate (Tr 759), is incapable of an economic measurement. The Opinion completely overlooks and fails to address the fact that Plaintiff's ability to obtain a job in his chosen profession of loss prevention has been permanently annihilated by Bass Pro's egregious conduct. Insubordination goes directly to character and integrity of this 37 year old man (Tr 171).

11. The Opinion also conflicts with Scott v. Blue Springs Ford Sales, Inc., 176 SW3d 140 (Mo banc 2005), which holds that Bass Pro bears the burden to show punitive damages is unconstitutionally excessive. The Opinion spells out the egregiousness of the defendant's conduct, yet fails to state how Bass Pro sustained its burden of proving its conduct did not merit the $2.8 million award. To focus on the disparity between the actual and punitive damages was also to conflict with Campbell, supra. which held in cases involving

egregious conduct but a small amount of compensatory damages, ratios greater than a single digit may comport with due process, Campbell, 412. After Campbell, the Missouri Supreme Court, in Scott, supra at 144, noted a punitive damages verdict ratio of 2,172 to 1 was upheld as being constitutionally acceptable in Kemp v. American Telephone and Telegraph Co., 393 F.3d 1354 (11th Cir. 2004).

12. The Opinion is also in conflict with Feirstein v. DePaul Health Center, 24 S.W.3d 220, 228 (Mo.App.E.D. 2000), which states, "The Appellate Court will interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and the trial court abused their discretion." Defendant has never claimed the jury and the trial court abused their discretion. Bass Pro has not even attempted to impeach any juror or the trial court.

13. The Opinion is in conflict with BMW of North America, Inc. v Gore, 517 US 559, 582, 116 S.Ct 1589, 134 LEd2d 809 (1996), which holds that actual and punitive damages serve two entirely separate and distinct purposes. Punitive damages are to punish the defendant and deter it and others from like conduct. An insignificant amount of punitive damages, such as single digit multipliers in low economic damage cases, do not encourage the protection of whistleblowers. In contrast, they would encourage the abuse and termination of whistleblowers by big companies, such as Bass Pro. An unscrupulous employer, such as Bass Pro, would

readily fire a whistleblower if the "penalty" were as insignificant as inferred in the Opinion. Punitive damages would lose their essential elements of punishment and deterrence. As held by the U.S. Supreme Court, punitive damages are imposed for purposes of retribution and deterrence, Pacific Mut. Life Ins. Co. V Haslip, 499 US 1 (1991), and may be constitutionally imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. Campbell, supra at 415. The ratio must be higher in low economic damage cases, or the punitive damages will not serve to punish or deter.

14. The Opinion is also in conflict with Brenneke v. Dept. of Missouri Veterans of Foreign Wars of the United States of America, 984 S.W.2d 134 (Mo.App 1998), which holds Missouri public policy is to protect an employee who is fired for reporting suspected criminal activity at his or her job to the proper authorities. The Opinion holds that three Appellate Judges can supplant their opinions for that of a unanimous jury verdict and the trial court. That protects the perpetrating employer not the employee.

OVERLOOKED FACTS

15. The December 18, 2007 Opinion was keenly perceptive, except for the few relevant additional facts:

(A) Bass Pro records still reflect Plaintiff was fired for insubordination and that record is subject to disclosure to anyone

wishing to look into Plaintiff's character (Tr 759). There was no way to establish actual damages for that but it certainly should have been reflected in the punitive damages because it goes to the lifetime harm caused Plaintiff by Defendant's egregious firing of him.

(B) Plaintiff lost his security license for life (Tr 404-424). That license is necessary for a loss prevention job.

(C) The trial court had performed a Campbell analysis before overruling Defendant's Post Trial Motions for Judgment Not Withstanding the Verdict and Remittitur. The trial court had the Campbell analysis of both the Plaintiff and Defendant and believed Defendant's conduct was so reprehensible as to merit the $2.8 million verdict to punish Bass Pro and deter it and others from like conduct. The Opinion completely overlooks that the trial court made this finding of fact or gave any deference to the trial court's finding. Under Cooper Industries, Inc v Leatherman Tool Group, 532 U.S. 424, 438-440 (2001), the Opinion should have deferred to the trial court's findings on reprehensibility , absent an abuse of discretion.

REASONS FOR TRANSFER

16. The Supreme Court should resolve the

conflicts of the Opinion with well established Missouri and federal precedents as noted throughout this Motion for Rehearing.

17. It would be extremely important to the bench and bar alike to know whether a punitive damages award, when in excess of 4 to 9 times actual damages, must be remanded to another jury for another trial to determine "what is proper". Should a trial court grant a new trial, if a jury verdict exceeds a certain ratio, regardless of the facts? That is the holding in the Opinion. The jury in this case observed all of the witnesses and their manner and demeanor, analyzed their testimony, and determined that the proper amount of punitive damages, to punish this Defendant and to prevent this Defendant and others from like conduct in the future, was 2.8 million dollars. The trial court reviewed that verdict in light of the Campbell factors and determined that was correct and constitutionally permissible. The Appellate Court should not second guess that experience with that of another jury without any trial court error. If the next jury should arrive at $4,300 punitive damages, will this Appellate Court give Plaintiff a second bite at the apple? It clearly gives the defense a fall back position in any punitive damages case. Defend a case, even with perjured testimony, to defeat a claim. If you lose, it might make you liable for punitive damages, but you can have a new trial on the amount, if the ratio is greater than 9 to 1. This is not the purpose or use for a new trial in Missouri. It is to correct trial court error. None has been alleged or established in this case. The sole remedy is remittutur of the verdict to the

constitutional limits. If the law is going to be completely different for allegedly excessive punitive damage awards, as opposed to excessive actual damage awards, the new law should come form the Supreme Court.

WHEREFORE, Plaintiff/Respondent hereby moves this Honorable Court to order a rehearing, or, in the alternative, transfer this case to the Supreme Court of Missouri.

GERRITZEN & GERRITZEN

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PROOF OF SERVICE

Copy of the foregoing was mailed this 28th day of December, 2007 to: Ms. Laura J. Johnson, Attorney for Defendant, The Hammons Tower, Suite 600, 901 St. Louis Street, Springfield, Missouri 65806; Mr. Robert J. Thomeczek, Local Counsel / Attorney for Defendant,

1120 Olivette Executive Parkway, Suite 210, St. Louis, Missouri 63132; and Mr. Mark G. Arnold, Husch & Eppenberger, LLC, 190 Carondelet Plaza, Suite 600, St. Louis, Missouri 63105.

s/Ray A. Gerritzen

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

KYLE J. KELLY	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	No. ED88392
	)	
BASS PRO OUTDOOR WORLD, L.L.C.,	)	
	)	
	)	
Defendant/Appellant.	)	

MOTION FOR REHEARING OR REHEARING EN BANC

Defendant/Appellant Bass Pro Outdoor World, L.L.C. (Bass Pro) respectfully prays that the Court rehear this case either in division or en banc. Judge Draper authored the opinion with concurrences from Judge Dowd and Chief Judge Cohen and the opinion was filed December 18, 2007. As grounds for rehearing, Bass Pro states:

1. The actual damages in this case are $4,300. The punitive damages were $2.8 million, or a staggering 651 times the actual damages. The panel correctly held that the punitive award was "unconstitutionally excessive." Slip Op. at 18.

2. The remedy that the panel chose was a remand for a new trial before a second jury,

presumably limited to punitive damages, after which the trial court "can determine whether the amount of the award is in accordance" with due process. Slip Op. at 18 n.5. Bass Pro seeks rehearing with respect to the remedy.

3. Bass Pro respectfully submits that the panel's remedy reflects a fundamental misunderstanding of the role of judge and jury in punitive damages cases. This is an issue of federal due process, so the holdings of the Supreme Court of the United States are binding on this Court. And the Supreme Court of the United States has squarely held that the maximum amount of punitive damages that comports with due process is a question of law for the courts, not a question of fact for a jury.

4. The panel cited no authority for the proposition that a new trial is a proper remedy for an excessive punitive award and Bass Pro believes that none exists. In the majority of cases, both state and federal, the reviewing court determines the purely legal issue of the maximum amount of punitive damages and remands with instructions to enter judgment in that amount. In a minority of cases, the reviewing court decides the maximum but gives the plaintiff the option of a new trial.

5. Bass Pro respectfully submits that the majority rule makes more sense. If the second jury awards more than the constitutional maximum, the excess can never be collected. If it awards less, the defendant gets and undeserved windfall.

6. Bass Pro also respectfully submits that the panel approach is unsound as a matter of policy. The excessive award in the first trial means that the case will not settle but must be retried. If the second jury also awards a large sum of punitive damages, the parties will be back in this Court a year from now making the same arguments. When the Court concludes that the second judgment also violates due process, what relief does it award: successive new trials until a jury finally gets it right?

7. In refusing to decide the purely legal question of the maximum amount of punitive damages that comports with due process, the Court has simply failed to do its job. The Court should therefore grant rehearing either in division or en banc; determine the maximum allowable punitive award; and remand with instructions to enter judgment in that amount.

Respectfully Submitted,

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Certificate of Service

I certify that true copies of the foregoing instruct were served on counsel identified below by placement in the United States Mail, postage paid, on January 2, 2008:

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s/Mark G. Arnold

In the Missouri Court of Appeals
Eastern District

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: January 30, 2008

RE: Motions for Rehearing And/Or Transfer to Supreme Court Denied

1. ED88392 KYLE KELLY, RES V BASS PRO OUTDOOR WORLD, APP

2. ED89807 CITY OF DESLOGE, RES V. ST. FRANCOIS, APP

IN THE SUPREME COURT OF MISSOURI

KYLE J. KELLY,
Plaintiff/Respondent ,Circuit Court No 03CV127432
Court of Appeals No. ED88392
vs. Supreme Court No. _____
Court of Appeals, Eastern District

BASS PRO OUTDOOR WORLD, LLC.,
Defendant/Appellant.

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _____ or after opinion X
(Check appropriate option)
The date the record on appeal was filed January 16, 2007
The date the Court of Appeals opinion was filed December 18, 2007
The date the motion for rehearing was filed December 28, 2007
and ruled on January 30, 2008
The date the application for transfer was filed in the Court of Appeals December 28, 2007
and ruled on January 30, 2008

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a

check mark in the space following to indicate each party applying for transfer.

Party		Attorney
Kyle J. Kelly, Plaintiff/Respondent	X	Ray A. Gerritzen, #15967 505 N. 7th Street, Suite 2505 St. Louis, Missouri 63101-1600
Bass Pro Outdoor World, LLC, Defendant/Appellant		Laura J. Johnson 901 St. Louis Street, Suite 600 Springfield, Missouri 65806 Robert J. Thomeczek 1120 Olivette Executive Pkwy Suite 210 St. Louis, Missouri 63132 Mark G. Arnold 190 Carondelete Plaza, Suite 600 St. Louis, Missouri 63105

1. Is there a U.S. Constitutional due process mandate of a single digit ratio between actual and punitive damages?

2. Should an Appellate Court, which finds punitive damages "unconstitutionally excessive" determine the appropriate amount of punitive damages or should it remand for a new jury trial on the issue of the appropriate amount of punitive damages only?

3. The Opinion[1] holding that there is a mathematical formula or bright line ratio between actual and punitive damages is in conflict with Hampton v State Farm Mutual Automobile Insurance Co., ---S.W.3d--- (Mo.App. W.D. 66791)(January 2008), Miller v Levering Regional Health Care Center, 202 S.W.3d 614 (Mo.App. E.D. 2006), and Scott v Blue Springs Ford Sales Inc., 176 S.W.3d 140 (Mo. banc. 2005), Brenneke vs. Department of Missouri Veteran's of Foreign Wars of the United States of American, 984 S.W.2d 134, 138-139 (Mo.App. W.D. 1998) and other decisions cited herein.

4. The Opinion fails to give due deference to the unanimous jury verdict upheld by the trial court, which is in conflict with Hampton, supra., Miller, supra., and Scott, supra. that provides a quasi de novo standard of review.

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[1]Opinion refers to the December 18, 2007 Eastern District Opinion.

STATEMENT OF FACTS

This is a whistleblower case in which Plaintiff alleged he was fired because he had a reasonable basis to report what he believed to be a crime being committed by the Bass Pro head of loss prevention at the St. Charles, Missouri store. Judgment was entered following a unanimous jury verdict of $4,300 actual damages and $2,800,000.00 punitive damages. The trial court denied Defendant's post trial motion. The Opinion focused "on the second Campbell guideline of, 'the disparity between the harm and punitive damages award'" and "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Based on this the Opinion remanded the case for a new trial only on the amount of punitive damages, footnoting "Once there has been a jury finding as to the proper amount of punitive damages, the trial court can determine whether the amount of the award is in accordance with Campbell, *supra*, and enter judgment accordingly."[2]

LEGAL BASIS FOR TRANSFER

1. The Opinion erroneously construed Campbell, supra., as limiting punitive damages to a single digit ratio, and said that the ratio of 651:1 raises a presumption of unconstitutionality (Opinion page 17). Campbell makes no such holding. Post Campbell, Kemp v American Telephone and Telegraph, 393 F3d 1354 (11th Cir. 2004), upheld a

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[2]The trial court addressed this very issue when overruling Defendant's post trial motion.

ratio of 2172:1. Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages verdict, BMW of North America, Inc. v Gore, 517 US 559, 574, 116 S.Ct. 1589, 134 LEd2d 809 (1996) and Barnett v. LaSociete Anonymie Turbomeca France, 963 S.W.2d 639 (Mo.App. W.D. 1997). Higher damage ratios are appropriate in cases with a small amount of economic damages, Campbell, supra at 1516; Gore, supra at 582. The Opinion failed to note that precedent. In TXO Production Corp. V Alliance Resource Corp., 509 US 443 (1993), the U.S. Supreme Court approved a ratio of 526:1 in a case with only $19,000 in actual damages and $10,000,000.00 in punitive damages. That formula results in $2,261,800.00 ($4,300.00 x 526=$2,261,800.00). The State's interests present in this case, the degree of reprehensibility of the Defendant's conduct, and the financial vulnerability of the Plaintiff justifies the punitive damages unanimous verdict of $2,800,000.00 was and is constitutionally permissible. The facts show, Instruction No. 10 required the jury to find, and the unanimous verdict established that Defendant's outrageous conduct showed a complete indifference to and conscience disregard for the safety of others in order to assess punitive damages. Outrageous conduct is more than reprehensibility. The facts also show that Defendant took away Plaintiff's livelihood in his chosen profession of a security agent. When Plaintiff lost his employment with Bass Pro he lost his security license (Tr 404). Bass Pro records still reflect Plaintiff was fired for insubordination and that record is subject to disclosure to anyone wishing to look into Plaintiff's character (Tr 759). Juries, courts and congregational committees abhor lying under oath as

the epitome of reprehensibility. Plaintiff argued the conduct of the Defendant was completely and totally outrageous and an evil motive to use Kelly as an example (Tr 773). Plaintiff further argued the $4,300 was nothing compared to the fact that Bass Pro's records show he was fired because he was insubordinate (Tr 404 & 759). This was an outrageous evil motive (Tr 779) and Kyle Kelly was a scapegoat (Tr 780). The facts are Rogers, the store manager, was going to fire Plaintiff whether Ritter committed a crime or not (Tr 754). A complete reading of Campbell requires the jury's unanimous verdict, affirmed by the trial court after being asked to reduce it, should be affirmed by this Honorable Supreme Court.

The Opinion infers punitive damages of $17,200 (4 times actual) to $38,700 (9 times actual) would be constitutionally permissible. That would do nothing to punish and deter Bass Pro. It would actually encourage unscrupulous employers, such as Bass Pro, to fire whomever they wanted for reporting any corporate wrongdoing. Such ratios trivialize the strong State's interests involved with this case and essentially grant limited immunity to companies with huge corporate profits, who fire employees for reporting crimes or suspected crimes. If an employee making $5 per hour reports a rape by a manager, is fired and has $500 actual damages, is the punitive damages to be limited to $4,500? The real punitive damages issue here is what amount of money will punish Defendant Bass Pro for egregiously, maliciously, intentionally and vindictively firing Plaintiff for reporting criminal activity of management without any investigation whatsoever

and deterring Defendant and other large corporations from treating its employees in the same fashion. The Opinion specifically holds at pages 15-16, management failed to interview anyone other than Ritter or investigate the incident by taking the minimal step of viewing the video prior to Kelly's termination, evidencing Bass Pro's reckless indifference to the possible crime a senior member of its management committed. The Opinion also emphasized the perjury of Rogers in holding at page 16, "Most telling is Rogers' testimony that he was going to terminate Kelly regardless of whether Ritter committed an actual crime and that he told the loss prevention members after Kelly's termination that he authorized Ritter to "break into" the Buick, despite having no knowledge of the Buick or Ritter's actions until several days after it occurred."

2. Campbell does not confer upon appellate judges a constitutional right to reverse a jury's verdict, because a certain ratio is not met. The U.S. Supreme Court has repeatedly stated that it does not believe there is a bright line ratio between actual and punitive damages. Campbell, supra; and Gore, supra. This case should be transferred to the Honorable Missouri Supreme Court and decided based on the analysis pronounced by the U.S. Supreme Court in Cooper Industries, Inc v Leatherman Tool Group, Inc., 532 US 424 (2001) and Gore, supra. The Opinion does not even attempt the required constitutional analysis. Instead, it reverses based on the ratio alone. Furthermore, if the jury's verdict is not the result of trial error or misconduct, but it appears to be grossly excessive, outrageous or the result of an honest

mistake, "it is the duty of the court to modify the verdict". Barnett, supra at 661. In the case at bar, no trial court error has been demonstrated, and no misconduct was even mentioned. The Opinion is completely devoid of referring to any event that occurred at trial that incited bias and prejudice of the jury. Miller, supra. Thus, the appellate court's duty is either to affirm the award of punitive damages or modify the Judgment such that it does not violate due process. Remand for a new trial should not be an option, unless Plaintiff refuses to accept the remitted verdict, Barnett, supra. See also Letz v Turbomeca Engine Corp., 975 SW2d 155, 180 (Mo App WD 1998) In Campbell, supra, the U.S. Supreme Court remanded the case to the Utah Supreme Court for a decision consistent with the Opinion. In Gore, supra., the U.S. Supreme Court noted that whether the appropriate remedy was a new trial or merely an independent determination by the Supreme Court was a matter for the Alabama Supreme Court. A new trial on solely the amount of punitive damages requires a retrial of the entire case because the underlying conduct will have to be brought out. This is unprecedented. The Opinion established all the essential elements and factors necessitating a very high punitive damages award, including the high degree of reprehensibility of Defendant's conduct and notes the numerous opportunities where the Defendant failed to act, but it fails to recognize that this establishes a greater degree of reprehensibility. Failure to correct the problem enhances the reprehensibility of the conduct. In re Exon Valdez, 296 F. Supp 2d 1071 (D. Alaska 2004).

3. The Opinion is in conflict with Hampton

v State Farm Mutual Automobile Insurance Co., --- S.W.3d--- (Mo.App. W.D. 66791) which held at page 10, perhaps the most important indicium of the reasonableness of punitive damages award is the degree of reprehensibility of the Defendant's conduct. Reprehensibility is pointed out in paragraph 1 above.

The Opinion also conflicts with Miller v Levering Regional Health Care Center, 202 S.W.3d 614 (Mo.App. E.D. 2006), which specifically teaches there is no mathematical formula or bright line ratio used to determine if a punitive damages award is excessive. In pertinent part, there are two factors are used: the degree of reprehensibility and the disparity between the harm suffered and the punitive damages award. Court's focus on the reprehensibility factor. Miller, supra., at 620.

Failure to affirm the $2,800,000.00 punitive damages is also in conflict with Scott v Blue Springs Ford Sales Inc., 176 S.W.3d 140 (Mo. banc. 2005), which specifically held that the court's refusal to adopt an arbitrary ratio for reviewing punitive damages awards is consistent with the recognition that punitive damages further states legitimate interest in punishing a wrongful conduct and deterring its repetition and points out the upholding of a punitive defense ratio of 2172:1 was approved post Campbell, in Kemp v American Telephone and Telegraph, 393 F3d 1354 (11th Cir. 2004).

The Opinion is also in direct conflict with Missouri's public policy to protect whistleblowers. Brenneke v. Department of Missouri Veteran's of Foreign Wars of the United States of American, 984

S.W.2d 134, 138-139 (MoApp.W.D. 1998) and the U.S. Supreme Court's acknowledgement that punitive damages are to punish and deter. Campbell, supra at 415.

The verdict and the Opinion establish that the termination of the Plaintiff was the result of intentional clandestine malice, trickery and deceit, as opposed to a mere accident. The Opinion noted Defendant engaged in numerous activities to cover up the criminal activity of management. The Opinion establishes Plaintiff had a reasonable basis to believe Bass Pro management committed a crime; Plaintiff was terminated because he reported that criminal activity; Bass Pro management concocted a false reason for Plaintiff's termination and had its managers commit perjury in their depositions and at trial to cover up the real reason for Plaintiff's termination; Bass Pro threatened other employees with termination, if they did not help cover up the criminal activity of management; and Bass Pro repeatedly refused to correct the problem through trial. Bass Pro's entire defense was a deceitful fraud on the court, the jury, and all its employees, including Plaintiff. It was a concocted story to scare employees to never report crimes of Bass Pro management. The Opinion particularly establishes perjury on the part of the store manager, Rogers (Opinion page 16). In TXO Prod. supra., a similar scheme of trickery warranted a punitive damages award of $10,000,000.00 with only $19,000.00 in actual damages or a ratio of 526:1. This U.S. Supreme Court precedent is not mentioned in the Opinion. Defendant could have corrected the sitution by viewing the videotape, talking with some of the

employees, performing a cursory examination, admitting what the tape showed, at any point up to when Plaintiff was terminated or at trial but Defendant intentionally chose to repeatedly cover up the illegal actions of management rather than admit the wrongdoing and correct the problem. This is a strong reprehensibility factor weighting, not only in favor of a punitive damages award, but a high punitive damages award. TXO, supra. In fact, the Defendant was so bold in the case at bar, that it threatened numerous employees in loss prevention with termination, if they did not conceal the crime committed by management. The termination of Plaintiff was not an isolated incident, but rather, part of an entire scheme to cover up the criminal activity of Karl Ritter, the head of loss prevention at the St. Charles store.

4. That a jury verdict shall remain inviolable is established by the Missouri Constitution at the time of statehood in 1820. Scott, supra., at 142. The assessment of damages is primarily a function of the jury. Miller, supra., at 620. The Appellate Court should review the evidence in the light most favorable to the Verdict, Schmid v. Langenberg, 526 S.W.2d 940 (Mo.App. 1975), Anderson v. Mutert, 619 S.W.2d 941 (Mo.App. 1981) and interfere only when the verdict is so grossly excessive that it shocks the conscience of the court and convinces the court that both the jury and the trial court abused their discretion, Feinstein v DePaul Health Center, 245 S.W.3d 220 (Mo.App. E.D. 2000). Defendant has not claimed nor shown that the jury and the trial court abused their discretion.

Hampton v State Farm Mutual Automobile

Insurance Co., ---S.W.3d--- (Mo.App. W.D. 66791) specifically holds at page 9, We review de novo whether the trial court correctly applied State Farm Mut. Auto. Ins. Co. v Campbell, and "However, we defer to the trial court's findings of fact unless they are clearly erroneous. Cooper Indus. Inc. v Leatherman Tool Group, Inc., 532 U.S. 424 (2001). The Opinion ignored the factual findings made by the jury which were not clearly erroneous. Cooper Industries, Inc. v Leatherman Tool Group Inc., 532 U.S. 424 (2001). Hampton, supra., teaches:

"**** the possibility of punitive damages provides one of the most effective deterrents of future misconduct by a defendant or by others who may be similarly tempted****" Scott, supra., at 143. No court has imposed inviolable constitutional limits on the ratio between punitive and compensatory damages. To do so would require the court to supplant the jury's considered decision in favor of an arbitrary limit that may have no relationship whatsoever to the extent and severity of the defendants's misconduct. The Missouri Supreme Court en banc further held that the reference to single digit ratio between punitive and compensatory damages is dicta and emphasized that Campbell stated, "in cases involving egregious conduct but a small amount of compensatory damage ratios greater than a single digit may comport with due process."

The Opinion also conflicts with Miller, supra., which held, "The jury reached verdicts appropriate on the facts before them. ***** To then apply the mathematical formulas advanced by Levering to

aggravating circumstances damages would defeat the very purpose of the law. This record shows a calm and deliberative jury that reached reasoned results." Miller, supra., at 620.

The Opinion also conflicts with Scott, supra., which states there is nothing in the law that vests Appellate Court's with a license to toss aside considered jury verdicts based upon arbitrary ratios or mathematical formulas. Scott, supra., at 144.

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PROOF OF SERVICE

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Missouri 63132; Mr. Mark G. Arnold, Husch & Eppenberger, LLC, 190 Carondelet Plaza, Suite 600, St. Louis, Missouri 63105; and Ms. Laura Thielmeier Roy, Clerk of the Missouri Court of Appeals, Eastern District, One Post Office Square, 815 Olive Street, St. Louis, Missouri 63101.

s/Ray A. Gerritzen

IN THE SUPREME COURT OF MISSOURI

EN BANC

KYLE J. KELLY,	) Circuit Court No. 03-CV-127432
Plaintiff/Respondent,	) Court of Appeals No. ED88392
	) Supreme Court No.____
vs.	) Court of Appeals,
	) Eastern District
BASS PRO OUTDOOR WORLD, L.L.C.,	) Circuit Court for St. Charles County
Defendant/Appellant.	)

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ☐ or after opinion ☒

The date the record on appeal was filed January 16, 2007

The date the Court of Appeals opinion was filed December 18, 2007

The date the motion for

rehearing was filed January 2, 2008

and ruled on January 30, 2008

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party apply for transfer.

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Reasons for Transfer

1. If permitted to stand, the court of appeals' opinion (attached as Exhibit A) will wreak havoc on three important and oft-recurring legal issues:

A. What should a court do when it decides that a punitive damage award violates due process because it is excessive? The court of appeals held that the proper remedy is a new trial on punitive damages before a second jury. since the issue is purely one of law, plaintiff and Bass Pro both agree that the appellate court must decide the maximum punitive award consistent with due process.

B. Can plaintiff make a submissible case of punitive damages based on evidence of allegedly reprehensible conduct directed solely to a third party rather than plaintiff? The court of appeals said yes. Vaughn v. North American Systems, Inc., 869 S.W.2d 757 (Mo. banc 1994), and State Farm Mut. Auto. Ins. Co., v. Campbell, 538 U.S. 408 (2003), say no.

C. Can plaintiff make a submissible case under the whistleblower exception to the at-will employment doctrine based on his subjective belief, and that of his cronies, that the conduct he reported was a crime? The court of appeals said yes, based on an unprecedented expansion of Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1 (Mo. App. 2005), which itself substantially relaxed the proof required by prior cases. Bass Pro says no. If an employer is to

retain any ability to discipline its employees, the whistleblower must prove that his belief that the conduct is a crime is objectively reasonable. And the courts, not the jury, must decide whether the belief was reasonable.

Factual Background

2. Plaintiff was employed as a loss prevention associate (security guard) at Bass Pro's St. Charles store. One day a woman abandoned her car in the parking lot adjacent to the store. Three weeks later, plaintiff's supervisor, Karl Ritter, used a "slim jim" to enter the abandoned car. Ritter testified that his motive was to identify the owner of the car and there is no contrary evidence.

3. Another loss prevention associate video-taped Ritter's acts and showed the tape to various loss prevention employees, including plaintiff. Several employees testified that they believed Ritter's conduct constituted a crime of breaking and entering (no such offense exists) or second degree tampering (though §569.090.1 (1) R.S.Mo., requires proof that Ritter's motive was to substantially inconvenience the owner). Plaintiff also testified that Ritter, a private citizen, had committed a crime because he had no probable cause to enter the car.

4. Plaintiff and his co-employees decided to report this "crime" to Bass Pro management and selected plaintiff to make the report. He reported it to the assistant store manager, who testified that he told plaintiff not to discuss the incident with anyone.

The next day, plaintiff, who disliked Ritter's attempts to enforce Bass Pro's rules, told a co-employee that he would report Ritter's "crime" to the authorities if Bass Pro did not fire Ritter.

5. Four days later, Bass Pro terminated plaintiff. Bass Pro's theory of defense was that it fired plaintiff because he discussed the issue with another employee after being told not to. Plaintiff's theory was that Bass Pro was retaliating against him for reporting Ritter's conduct. The jury credited plaintiff's evidence on this issue and, on appeal, Bass Pro does not challenge submissibility of causation.

6. Plaintiff found a new job, at higher pay and better benefits, within a few weeks of his termination, so his economic loss was only $4,300. He argued for no other damages and the jury awarded him that amount. Then it awarded $2.8 million in punitive damages. The trial court refused to reduce the punitive award.

7. The court of appeals correctly held that the $2.8 million punitive award violated due process under the State Farm guidelines for excessive punitive awards. Slip Op. at 18. It did not, however, decide the purely legal question of what the maximum punitive award on this record would be. Instead, it remanded for a second jury trial on punitive damages. Id. The court of appeals did not cite any authority that such relief was appropriate and it did not explain why a second jury should decide a pure question of law.

Argument

I. The Court, Not A Jury, Must Decide The Maximum Punitive Award Consistent with Due Process.

8. The maximum amount of punitive damages consistent with due process is purely a question of law. Juries do not decide questions of law. Courts do. The court of appeals abdicated its responsibility to decide a question of law and its opinion, if followed, will lead future courts to do the same.

9. State Farm leaves no reasonable doubt that the issue is one of law. The Supreme Court has instructed appellate courts to "conduct de novo review of a trial court's application of the State Farm guidelines on the permissible size of a punitive award. 538 U.S. at 418. The reason for that requirement is to "ensure that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice." Id. (citations and internal punctuation omitted). Accord, Cooper Indus., Inc. v Leatherman Tool Co., 532 U.S. 424, 437 (2001) ("because the jury's award of punitive damages does not constitute a finding of 'fact,'" de novo review "does not implicate the Seventh Amendment").

10. No Missouri case has directly addressed the issue. The closest is Judge Lowenstein's dissent in Peters v. General Motors, Inc., 200 S.W.3d 1 (Mo. App. 2006) The majority found that Peters did not have a submissible case for punitive damages and thus did not reach the issue of the amount. Judge

Lowenstein would have remanded with instructions to remit the award. He did not suggest a new trial on punitive damages. 200 S.W.3d at 34 (Lowenstein, J., dissenting).

11. This Court has addressed the conceptually identical issue of what to do with a verdict exceeds a statutory cap on damages, such as the limits on damages against the sovereign. Teeter v. Mo. Highway & Transp. Com'n, 891 S.W.2d 817, 821 (Mo. banc 1995) ("[s]ince the damages exceeded the statutory cap, the trial court should have entered judgment against MHTC in the amount of $100,000"). Accord, Jones v. St. Louis Housing Auth., 726 S.W.2d 766, 775 (Mo. App. 1987) ("the judgment for Plaintiff is limited to $100,000"). Neither case remanded for a new trial in hopes the second jury would get the legal issue right.

12. In rejecting a constitutional challenge to limits on the sovereign's liability, this Court drew precisely the same distinction between fact and law that Campbell and Leatherman did. The "jury's primary function is fact-finding, including the determination of damages." Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876, 880 (Mo. banc 1993):

> The court's role is to apply the law to the facts. Section 537.610 establishes the legal limits on the state's liability to the Richardsons. Because this section does not apply until after the jury has completed its task, §537.610 does not infringe the right of a jury trial.

863 s.W.2d at 880 (citations omitted). That is exactly what this case presents. Due Process establishes legal limits on Bass Pro's liability for punitive damages. It is for the courts to determine those limits and then apply them.

13. Federal courts addressing constitutionally excessive punitive damage awards endorse this analysis. Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1331 (11th cir. 1999) ("the court, not the jury, has the responsibility for determining this constitutional limit"); Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1050 (8th Cir. 2002) ("the court must decide this issue as a matter of law"); CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., 499 F.3d 184, 195 (3rd Cir. 2007) (court "remand[s] this case with instructions to enter a new judgment for punitive damages in the amount of $750,000").

14. The court of appeals' remedy is also extremely inefficient for both the courts and the parties. The grossly excessive punitive award in the first trial means that no reasonable settlement is possible, so the case must be retried. Suppose the second jury hands down a multi-million punitive damage award and the trial court again refuses to do anything about it. In a year's time, the parties will be back before the appellate courts asking, once again, for an answer to the purely legal question of how much is too much. Under the court of appeals' approach here, the case would be remanded for another trial to a third jury.

15. The recent enactment of statutory caps on punitive damages, §510.265, does not affect the importance of the issue. There are plenty of cases, like this one, that were filed before the effective date of the statute where the only limits are those imposed by due process. If applied to this case, the $500,000 statutory cap would be more than 115 times the actual damages of $4,300. Since there is no proof at all of any reprehensible conduct directed to plaintiff, such an award would violate due process.

16. Plaintiff and Bass Pro are in agreement on the remedy ordered by the court of appeals. Plaintiff's motion for rehearing (Exhibit B) correctly described that remedy as "unprecedented." Motion ¶ 8. Plaintiff also suggested that the court should "limit the punitive damages award only to the extent necessary to bring the award within constitutional limits." Id.

II. The Court Cannot Sustain An Award Of Punitive Damages Based On Allegedly Malicious Conduct That Was Neither Directed To Nor Injured The Plaintiff.

17. Standing alone, a retaliatory discharge does not warrant punitive damages, Altenhofen v. Fabricor, Inc., 81 S.W.3d 578, 592 (Mo. App. 2002), and the court of appeals did not hold otherwise. Instead, it relied on evidence that, the court concluded, established that Bass Pro had behaved reprehensibly:

- The "incident that precipitated Kelly's

termination was a wrongful act intentionally done by a member of Bass Pro's management." Most of the balance of this paragraph discusses the actions Ritter took with respect to the car. Slip Op. at 15.

- "Bass Pro's response to Ritter's conduct" was "without just cause of excuse, thus evidencing Bass Pro's reckless indifference to the possible crime." The balance of this paragraph discusses Bass pro's allegedly inadequate investigation of Ritter, its refusal to view the video, and its alleged authorization of Ritter's action. Id. at 16.

18. That evidence relates solely to conduct directed at the owner of the car, not at plaintiff. The only evidence to which the court points affecting plaintiff is Ritter's alleged threat to cut short the whistleblower's employment and the manager's testimony that he intended to terminate plaintiff's employment regardless of whether Ritter had committed a crime. Slip Op. at 15-16. That evidence might prove that Bass Pro terminated plaintiff in retaliation for his whistleblowing, but it does not make a submissible punitive damages case.

19. In Vaughn v. North American Systems, 869 S.W.2d 757 (Mo. banc 1994), this Court squarely held that, under the common law, malice that was not directed to plaintiff and caused plaintiff no harm

cannot support punitive damages:

> The law has always required that plaintiff's damages must be the direct result of the wrongful acts alleged. Otherwise, a plaintiff could rove through all of a defendant's conduct that might justify punishment, but that caused plaintiff no injury....This requirement is the same whether the damages sought are compensatory or exemplary.

869 S.W.2d at 7589 (emphasis added).

20. State Farm reaches the same result on federal due process grounds:

> A defendant's dissimilar acts, independent from the acts on which liability was premised, may not serve as the basis for punitive damages....Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis....

538 U.S. at 422-23.

21. The court of appeals' approach, combined with §510.263.4, creates an absurd policy outcome. As a general rule, the statute requires the court to credit payments of punitive damages based on the same conduct against any subsequent punitive award. Suppose the owner of the vehicle sues Bass Pro for punitive damages arising out of

Ritter's actions. Since the punitive award here was based entirely on Bass Pro's conduct toward the owner, the courts would have to reduce her judgment by whatever it ends up paying plaintiff in punitive damages. It makes no sense that the person to whom "reprehensible" conduct is directed has to share a punitive award with someone to whom the conduct was not addressed.

III. The Court Of Appeals Has Dramatically Expanded Liability For Whistleblower Discharge.

22. In the seminal case on liability for whistleblower discharges, Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. App. 1985), the court held that plaintiff stated a cause of action by alleging that she was fired because she reported "serious misconduct that constitutions violations of the law." 700 S.W.2d at 878. Subsequent Missouri cases have generally adhered to that standard. E.g., Sivigliano v. Harrah's North Kansas City Corp., 188 S.W.3d 46, 48 (Mo. App. 2006) (petition dismissed because it did not plead "a violation of law") (emphasis original). These holdings are consistent with the rule that whistleblower claims are a "narrow" exception to the at-will doctrine. Faust v. Ryder Commercial Leasing & Services, 954 S.W.2d 383, 389 (Mo. App. 1997).

23. In Dunn, the court of appeals relaxed that standard, but in a very different context than here. Dunn alleged that he was fired because he refused to cook the books in anticipation of an initial public stock offering (IPO) and protested the order to

do so internally. Cooking the books for an IPO, if implemented, would unquestionably have been a crime. But the employer did "not complete its alleged unlawful act" and Dunn's protest "may have been one reason, if not one of the primary reasons" why. 170 S.W.3d at 9. In these circumstances, the court reasonably held that Dunn need not "prove an actual violation of law," id. at 11, but could prevail if Enterprise fired him for refusing to perform conduct that he "reasonably believed to be illegal." Id. at 9.

24. In the instant case, the court of appeals has held that the subjective beliefs of plaintiff and his cronies satisfy the "reasonable belief" standard. The problem, however, is not that Bass Pro abandoned proposed conduct that would have been illegal: it is that, as foolish as Ritter's conduct may have been, it did not rise to the level of a crime. Section 569.090.1 R.S.Mo., requires proof that the tamperer's "purpose" is "causing substantial inconvenience" to the owner of the vehicle. There is no evidence that Ritter had such a motive.

25. In allowing plaintiff's subjective beliefs to satisfy Dunn, the court of appeals has greatly expanded the scope of whistleblower litigation. The opinion recited Ritter's conduct; the cronies' testimony that Ritter had "committed the crime of either tampering or breaking and entering" (the latter does not exist); and a phone call to the St. Charles Police Department as evidence of plaintiff's reasonable belief. Slip Op. at 12. It glosses over the total lack of evidence that Ritter had the required motive with the casual conclusion that pl ntiff "need

not prove each element of the crime...beyond a reasonable doubt." Slip Op. at 13.

26. The court of appeals' subjective belief standard makes it entirely too easy for dissident employees to undermine their superiors. The dissident reports some conduct by her superior, labels it a crime, and demands that the employer fire the superior. Such conduct would completely disrupt the workplace. An employer that discharges the dissident would face a wrongful termination suit if the dissident and a few of her cronies claim they subjectively believed the conduct was a crime.

27. There is substantial evidence that plaintiff tried to use the video to get rid of Ritter. Bass Pro hired Ritter to whip the loss prevention department into shape and plaintiff did not like having to comply with Bass Pro's policies. A disinterested witness testified that plaintiff told him that plaintiff would report the matter to the authorities if Bass Pro did not fire Ritter.

28. Suppose a municipal judge works in a five-person law firm. Her secretary calls the prosecuting attorney to charge that "Judge X accepted a bribe by attending a lawyer's holiday party and drinking two glasses of wine." Anyone who pulled such a stunt could not remain employed at a small law firm. Under the court of appeals' opinion, the secretary has a submissible case of wrongful termination if he and a few friends testify they thought it was a crime for a judge to accept anything of value from a lawyer, even if he had no

evidence of the improper motive that the crime of acceding to corruption actually requires.

29. A proper balance, accommodating society's desire to encourage reporting of crimes with the employer's need for discipline, is simple: plaintiff must prove that his or her belief that a crime has been committed is objectively reasonable. Of necessity, the court, not the jury, must decide whether the plaintiff's belief is objectively reasonable:

> [A]llowing the jury to determine issues of law could wreak havoc upon established standards of review. Review of a jury verdict is curtailed dramatically compared to review of issues of law....[I]f we allowed juries to decide issues of law, errant juries may find a defendant liable on the basis of an incorrect interpretation of the law, and that finding may become immune from effective judicial review.

Flavan v. Cundiff, 83 S.W.3d 18, 26-27 (Mo. App. 2002) (Russell, J.) (citations and internal punctuation omitted).

IV. Procedural Compliance.

30. The court of appeals issued its opinion on December 18, 2007. On January 2, 2008, Bass Pro filed in the court of appeals a motion for rehearing (Exhibit C), memorandum in support thereof (Exhibit D), and application for transfer (Exhibit E). The court of appeals issued its order

denying these motions on January 30, 2008 (Exhibit F), and this application is filed within 15 days thereafter.

Conclusion

For these reasons, Bass Pro respectfully prays that this Court transfer this appeal.

Respectfully submitted,

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I certify that true copies of the foregoing instruct were served on counsel identified below by placement in the United States Mail, postage paid, on February 13, 2008:

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In the Supreme Court of Missouri
SC89102
ED88392
January Session, 2008

Kyle J. Kelly,
Respondent,

vs. (TRANSFER)

Bass Pro Outdoor World, LLC,
Appellant.

Now at this day, on consideration of the respondent's application to transfer and appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said applications be, and the same are hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas. F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2008, and on the 18th day of March, 2008, in the above-entitled cause.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 18th day of March, 2008

s/Thomas F. Simon